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*An aerial view of the seat of the government in Great Britain. Westminster and Whitehall house almost all the important ministries and government departments*

# LAW AND GOVERNMENT

## IN PRINCIPLE AND PRACTICE

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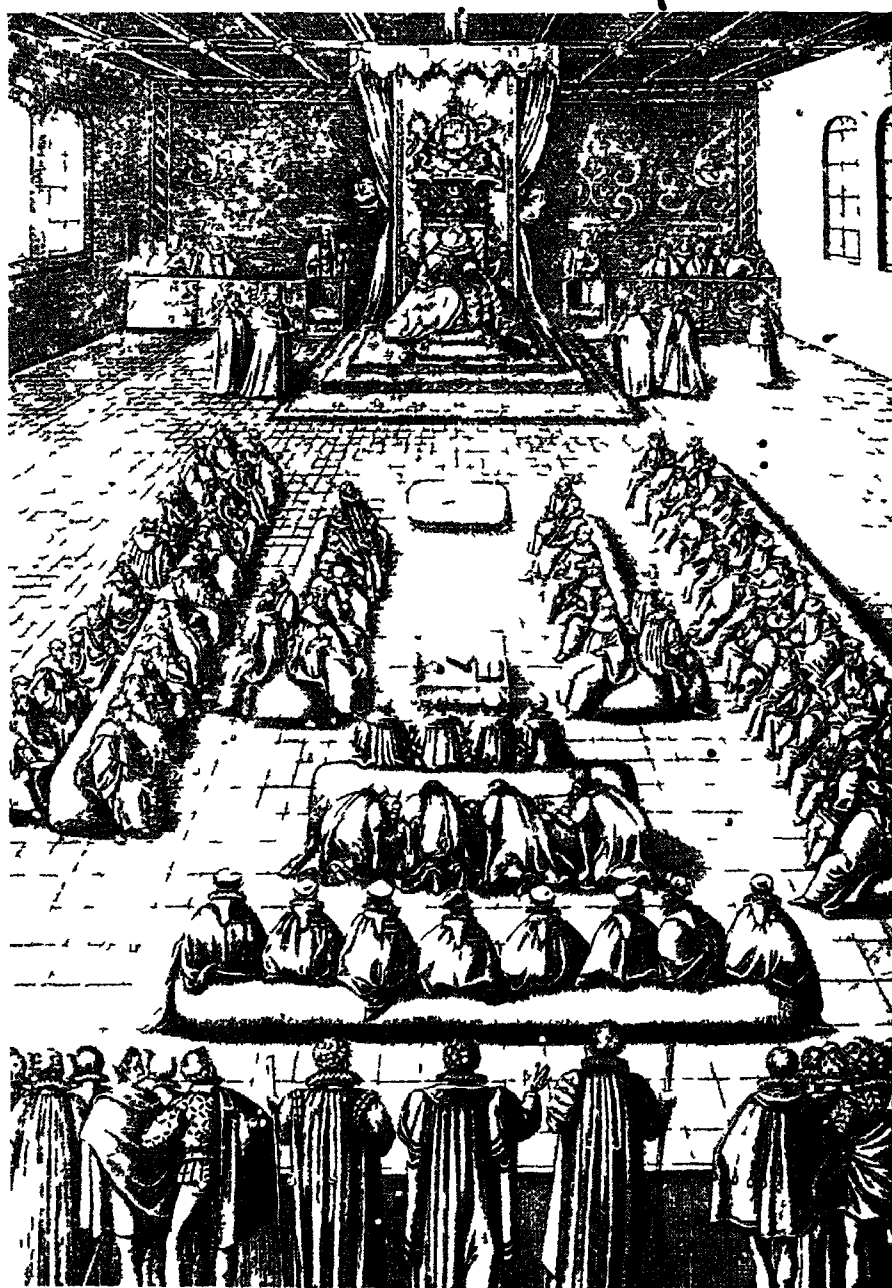
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#### QUEEN ELIZABETH IN PARLIAMENT

*In the illustration above, Queen Elizabeth is seen enthroned in the House of Peers, with the Commons attending. The latter are seen in the foreground, the central group consisting of the Speaker of the Commons, Black Rod and the Sergeant-at-Arms.*

# THE NATURE OF GOVERNMENT AND LAW

THIS book will give the reader some account of the main lines upon which government and law have developed in a number of different countries. But political institutions become more interesting and our judgments about them are more likely to be fair if we have given thought to some of the questions of political theory which lie behind them. To begin with, therefore, we shall consider a few of these fundamental questions and indicate some of the answers that have been given to them, questions such as why it is that men ordinarily accept the restraints on their freedom of action that the existence of government imposes, how, if at all, can the authority that governments claim be justified, to what extent, and for what reasons, law is one of the instruments that governments use.

These are questions that most of us do not consciously ask ourselves, and yet some sort of answer is often implicit in the judgments that we habitually form and express about the practical politics of the day. They are questions to which great minds have tried to find the answers, and to which many different answers have been given, and it is worth while to take a brief glance at some of those answers which have been the most influential in the development of political thought.

## Is Government Justified •

Consider first the question: Can government be justified? Has anyone a *right* to govern? One answer, commonly given, is that authority is simply a fact in the world as is life or air, and being so it demands acceptance, not justification. The prudent man will take account of authority just as he will of other circumstances of his environment, it exists, and it always has existed ever since men have lived together in societies. Whether we should do the bidding of constituted authority or not, whether we should keep or break the

law, are just questions of expediency and not of right or wrong, all that can be said is that if we do not obey, there are sometimes unpleasant consequences for ourselves. Hence on this view the notion that anyone can have a *right* to rule over others is just a myth, those who do rule do so because nature or luck has given them some advantage over their fellow men in strength or ability or birth or wealth or whatever it may be, and they have been able to exploit this advantage.

## The Cynical Answer •

More than two thousand years ago Plato put the classical statement of this view into the mouth of Thrasymachus in his dialogue *The Republic*. What we call justice, Plato makes him say is nothing but the interest of the stronger governments make laws in their own interests and they punish those who transgress them because they have the power to do so. This cynical view of the nature of government has recurred in one form or another over and over again in the history of political thought and it could hardly have persisted in this way if it did not contain part at least of the truth. It is true that governments even if they are not entirely self-interested can only govern according to their own view of what the public interest requires, and it is true that all of us are so constituted that we do not always clearly distinguish between the interest of ourselves or of our class and the interest of the whole community. Many of us are selfish, and many of us are easily deceived either by ourselves or others. Most men, however, are not wholly selfish and no society could hold together if they were. The purely cynical view of the nature of political obligation has its basis in a view of human nature which we all know in our hearts to be a one-sided view because it leaves out all but the baser side

of it. It warns us of a danger to which all government is exposed, namely, that rulers may govern in their own interests and without regard to justifying their rule but it gives us only one small fragment of the truth.

The search therefore for some principle behind political authority and justifying its existence is not an idle one, and we must examine some of the results which have been put forward.

### St Paul's Belief

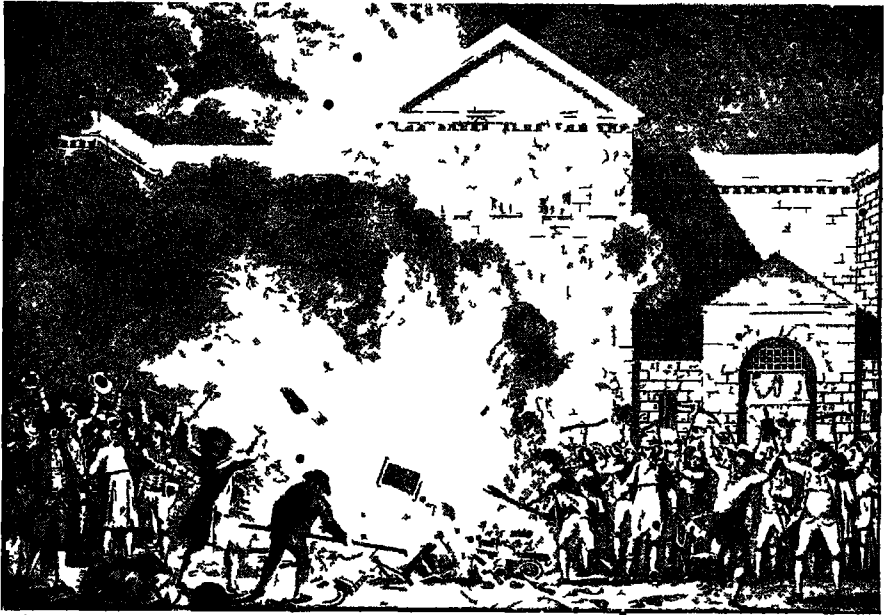
One is the view that government is in some way divinely instituted. St Paul stated this view in an unqualified form when he wrote: Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God.

These words have powerfully influenced political thought ever since St Paul used them, but they have too often been taken out of the context in which they occur. St Paul was writing to the Christians at Rome and he was probably referring to quarrels between the Christians and the Jews in which the Roman Government had had to intervene in order to preserve the peace. There is really no reason to believe that he was intending to enunciate a political principle which was to apply at all times and irrespective of circumstances. Such an inflexible principle would require us to believe that the power of Hitler was "ordained of God" for while it lasted Hitler was certainly one of the 'powers that be'. It would leave a man quite uncertain of his duty when his allegiance is demanded by more powers than one and they are in conflict. It cannot be that in such a case he should away the issue and then give his allegiance to whichever is the victor for that would be to say that might is right which is surely not a precept divinely ordained.

No doctrine which affirms the absolute right of governments to rule simply because they are governments, whether it comes to us in the religious form of divine right or as an ethical dogma denying that anything can ever justify revolution, can be accepted, both because it is

morally indefensible, and also because it cannot solve our difficulties if it is accepted. But again such doctrines do stress one element of the truth though they greatly exaggerate it. They do remind us that no society can hold together unless its members regard the overthrow of constituted authority as a very serious matter. The right of the individual to judge for himself the legitimacy of the claims of authority upon him cannot be absolute, though it may not be easy to define how far this right should extend. But against the evils even of a bad government it is always a moral duty to weigh the evils that political upheaval may bring in its train.

Another justification of the authority of government which also has recurred in many forms throughout the history of political thought is the idea that men have agreed of their own free choice to put themselves under it and that they are bound to keep this agreement that they have made. This is the doctrine of the social contract, and the first and obvious criticism of it is simply that it is not true, men never did so agree, and governments did not come into existence in this way. The picture which it calls up of primitive men first living together without any government over them, and then finding this state of anarchy so inconvenient that they decide to set up an authority over themselves in order to improve their lot is a pure figment of the imagination, and anthropological research into the habits and ways of thinking of our ancestors has shown conclusively that it has no foundation. Some sort of government is as old as human society itself. But the non-historical character of the social contract has always been so obvious that its adherents have not as a rule put it forward as a true account of the manner in which government did actually begin, they have only thought that it provided a rational justification to explain why men do, and why they are under an obligation to, submit to being governed. They argue that if we imagine this agreement to have taken place, the facts become coherent and intelligible, they are as they would be if it really had been made.



# RIOT AND REVOLUTION

While there are circumstances in which revolution may be morally right the evils of social upheaval must be weighed against the evils of tyrannical government. Above the Gordon riots (1780) burn Newgate Gaol in protest against the Catholic Relief Acts. Below Parisians storm the Bastille and give impetus to the French Revolution.



Now it is true that what gives any government authority is that most of us do approve, or at any rate that we acquiesce in the existence of that authority; most of us are not anarchists by conviction, and if the question were put to us we should admit that life without any government would be a very uncomfortable affair which we do not at all want to experience. Even so, there will probably always be a small minority who are anarchists, and there will be a much larger number of us who, while not objecting to government as such, may object to the particular government under which we find ourselves or to particular restraints that it imposes on our freedom of action. In any case, since none of us has ever been given the choice between government and no government, and since none of us, except those few who have changed their nationality, has chosen the particular kind of government under which we live, to say that we have agreed to something which we have had no chance to refuse is absurd. Nor does it really help the argument to say that the agreement is only a sort of metaphorical or pictorial representation of the facts, the answer to that is that it does not make the facts clearer, it only falsifies them.

#### Rights of the Governed

The difficulties of the theory increase if we go on to ask what it is that men must be supposed to have agreed to. It is not enough to say that we have agreed to be governed. We are entitled to be told whether, and if so why, we are supposed to have agreed to accept the actual government which we find ourselves placed under; whether we have agreed to a government possessing absolute or only limited powers over us, whether it was to be irremovable, or one that we could change if it proved unsatisfactory; and whether our agreement was made with the government itself, in which case we are presumably entitled to some *quid pro quo* from it, and the duty will not be one-sided, or with one another, in which case we can presumably make a new agreement among ourselves without asking the government



THOMAS HOBBS

*Hobbes who had lived through the English Civil War thought men were brutish and selfish. He advocated obedience to an absolute sovereign.*

to give its consent. These are fundamental questions, and the whole character of the government to which we are supposed to have agreed will depend on the way they are answered. Yet one answer to them is as good as another, and no one can say that any answer we choose to give is wrong. The attempt to explain government on the basis of a contract leaves the whole question of the nature of political obligation, which is the very thing it is supposed to help us to understand, suspended in the air.

This becomes very clear as soon as we begin to look at some of the answers that different writers who have made the social contract the basis of their systems have given to such questions as those which have just been put. Each writer has been able to frame the terms of the contract in such a way as to make it justify the particular kind of government which he personally preferred. Here, for instance, is the way in which Thomas Hobbes used the

social contract in *The Leviathan*, which is the rather fanciful name that he gives to the sovereign power in a state. Hobbes had lived through the anarchy of the Civil War in England in the seventeenth century, and it had convinced him that nothing can be too high a price to pay for the preservation of order, and that the best security for this was to be found in absolute government. So Hobbes drew a picture of man in his original state without any government over him, the so-called "state of nature"; he represented it as a state of utter anarchy and insecurity, in which every man was at war with every man.

Of course, this state of nature never existed historically, for even in primitive society men work together and are not perpetually quarrelling, but that would not have mattered if it had been psychologically a true account of human nature. But it is not; mankind does not consist of a large number of individuals each utterly selfish and each ready to do down his neighbour unless he is prevented, and the whole of Hobbes's teaching is falsified by the fact that he took for its starting point the notion that this was what men are like. However, according to Hobbes, man is capable of reasoning about this nasty condition in which he finds himself, and he has come to the conclusion that the only way to escape from it is to surrender his natural right to rule himself on condition that every other man does the same. So they have agreed to set up the Leviathan to rule over them all, and the object of doing this would not be achieved unless the surrender was absolute and irrevocable.

But for the contract to have this character we have to assume that it binds not only those who made it, but also the generations who succeed them, though obviously these were never consulted about its making and have never been given the option of remaining in or returning to the state of nature. Note, too, that, according to Hobbes's version, the social contract is made between the subjects of the government among themselves; there is no contract between them and the Leviathan, and consequently no reciprocal obligations

between sovereign and subjects. The sovereign's power is absolute, which was exactly the result at which Hobbes intended to arrive all through the argument. •

#### Locke and Rousseau

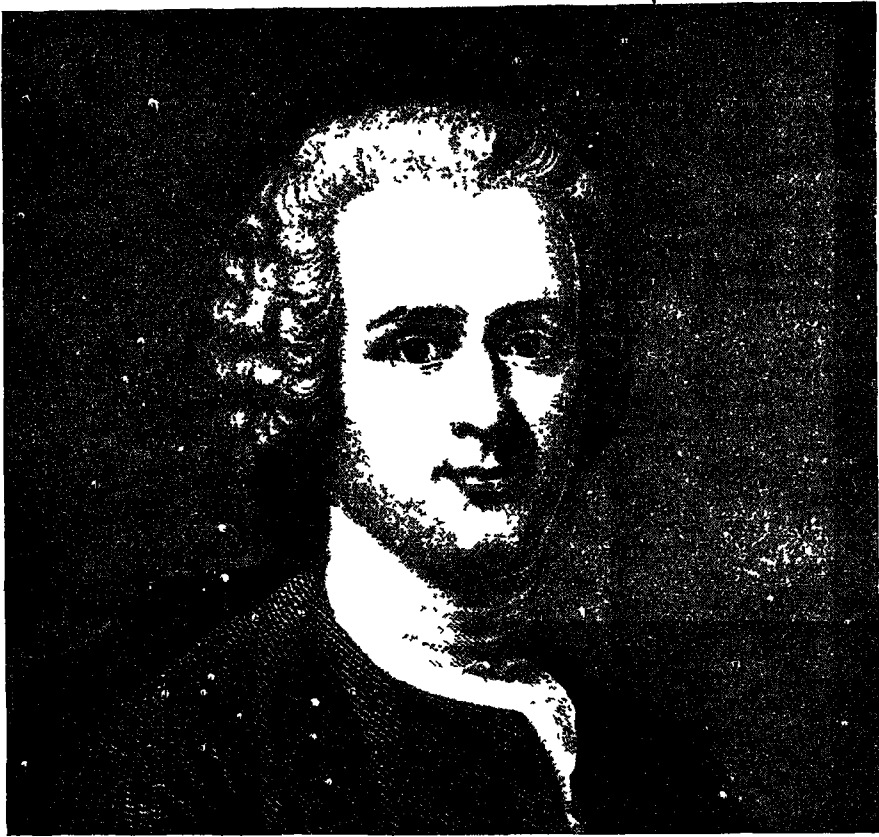
Now look at the way in which John Locke, in his *Treatise on Government*, was able to turn the theory of the social contract to a very different use a few years later. Locke wanted to defend the "Glorious" Revolution of 1688, and to prove that the English people had been within their rights in turning James II off the throne and inviting William of Orange to take it. Locke assumed that in the pre-political state of nature, every man had certain natural rights to freedom and property; his problem therefore is not, as in Hobbes, how to escape from an intolerable condition, but how to ensure man's enjoyment of the good things with which nature has endowed him. One picture is as far from the truth as the other. So he makes an agreement, not, as in Hobbes,



JOHN LOCKE

*Against Hobbes, Locke defended the Revolution of 1688, and held that men were endowed with natural rights to freedom and property.*





JEAN JACQUES ROUSSEAU

*Rousseau's theory that king and government are only the agents of the sovereign people was a factor in preparing the people to overthrow their rulers, who had proved incapable of modifying their feudal privileges to the extent demanded by a new epoch.*

with his fellow men, but with the sovereign, that in return for the protection that the sovereign is to give him he will accept the sovereign's authority. Thus the bargain is a two-sided one which binds the sovereign as well as the subject; the sovereign's power is only a limited power, and it is also a revocable one, because if sovereignty does not keep its side of the bargain then the subject of course cannot be held to it, he is released from the duty of allegiance.

Parliament made use of this very argument to justify the Revolution, when it accused James of having broken "the

original contract between king and people." Locke, in fact, had been able to find in the social contract a principle to justify "constitutional" government, a term to which we must return later in this chapter.

We may take one more famous version of the social contract, that which Rousseau gave to it. It is more difficult to state the essence of Rousseau's doctrine shortly, because it is often obscure, not always consistent, and has a vein of mysticism running through it. But Rousseau imagines the contract to be one in which each of us has agreed to surrender himself and all his rights absolutely, but not to the govern-

ment, the government is only an agent, the agent of the real sovereign, which is the people or the community or the state as a collective person.

Rousseau put his doctrine into the form of the social contract, but the form does not really fit his ideas; he probably used it in deference to the fashion of the political theory of the time. He tried, not very successfully, to prove that, in making this complete surrender, each of us is securing for himself the only true liberty, because, he thought, the real interest of the whole community must always be the real interest of each of us, even though it may not be our interest as we ourselves see it. This involves the paradox that the community may have to force a man to be free, and that it is justified in doing so if that is necessary. But the whole notion of the contract is an excrescence, which makes the argument more difficult to accept instead of helping it. What Rousseau was really trying to do was to explain how government can be justified—how men can submit to it and yet remain free men and not slaves, and he thought he could do that by showing that government is a natural development inasmuch as it is only in the state that men can fully realize their capacities. Here he was proclaiming something which is fundamentally true and important. But unfortunately he wrapped up the lesson he was trying to teach in language which makes only too easy the transition to that complete surrender of the individual to the state which is the essence of the totalitarianism of our own day, and totalitarianism is just as hateful a doctrine whether the individual is asked to make his surrender to a mystical entity called the "people" or to a personal leader.

It is obvious, therefore, that a doctrine which can lead to such opposite conclusions according to the choice of its exponents, and which is admittedly founded on a fiction, cannot be a satisfactory basis for our thought about the nature of government and law. Yet like the other doctrines which we have considered, the social contract does serve to bring out one aspect of the truth. It reminds us that government can never be justified for its

own sake, but only if it serves the governed, and also that no government can long endure which cannot somehow win the support of the people or at least their toleration.

But there is one even more fundamental fallacy behind all attempts to find the origin or the justification of government in a contract. All of them start from a false view of the nature of man's social relations. Let us see what this view is. They imply that each of us is a wholly separate being, and that our relations with others are something artificial and extrinsic, something with which, in theory at least, we could dispense without ceasing to be human beings. But that is not a true account of human nature. The natural state of man is not to be an individual separate from his fellow men, his nature is to be gregarious, to be an individual-in-society. From the cradle to the grave he depends entirely on others for the mere possibility of living at all, and the problem of authority takes on a wholly new aspect as soon as we adopt this more realistic approach to it.

#### Man's Social Need

The true starting-point is to remember that man can live only if he lives in society, and that he can live in society only if he accepts certain restraints on his freedom of action. These restraints are government in the germ. Anyone who has watched a baby in the first few months of its existence will have noted that the fact of government is the very first of life's lessons that it has to learn. The process of learning it is a painful one, and everybody rebels against it, but unless he does learn it he will grow up to be what we call a social "misfit." That is a very expressive phrase. Without government we should all be "misfits," all attempting to live in a way in which our nature makes it impossible for us to live. Hobbes said that life in the state of nature was "solitary, poor, nasty, brutish, and short," and in that he was right, he was only wrong in thinking that that is man's natural state. The social side of our nature, the side which entails our submission to government, is just as



FRONTISPIECE TO HOBBS'S "LEVIATHAN". 1651

*The king's body is made up of a respectful multitude, his sword and scepter show on what the serenity of the landscape depends. Below are symbols of civil and ecclesiastical power.*

truly part of our whole nature as the individual side

The art of living then, consists in recognizing and reconciling these two facts

- 1 That man is an individual with his own life to lead and not merely a limb or organ of a social whole,
- 2 That man cannot of his own choice live in isolation from other individuals, but can only survive in association with others that is, as part of a social whole

In short, our nature has not allowed us a choice between government and anarchy it has settled the question for us without asking for our views But it has only settled the question of principle for us, it leaves us free to make a good or a bad job of government, just as we can make a good or a bad job of our private lives

More than on anything else the quality of a government depends on the part that it allots to law, the subject which has been joined with government in the title of this book.

#### Law and the Citizen

The layman is inclined to think of law as something that only occasionally intrudes into his life The common expression "going to law" typifies this attitude, if we "go" to law, we do so only because we must in much the same way as we "go" to the doctor But that is a very limited way of thinking of law In Britain, law is all-pervasive in our daily lives, and for most of the time we are hardly more conscious of its presence than we are of the atmosphere that we breathe

It might seem that we ought to begin by attempting to define law, but that is a task which has always baffled students of the science One of the difficulties is that at different stages of human history law has presented, outwardly at least, very different appearances, so that if we say that for law to be present this or that institution which we have come to associate with it, such as courts, or legislatures, or policemen, must also be there, the historian or the anthropologist will upset our definition by showing us that law has existed at times and in places when none of these

modern concomitants of it was present It is sufficient for the present purpose to say that when the powers of government are exercised according to settled and binding rules and not arbitrarily, then the subjects of that government are living under the rule of law

A few years ago most of us would have said that the advantages of government by law over any other kind of government were so plain that this was one of the settled questions of political science, but that conclusion has been challenged in our own times by the theory of the totalitarian state The portentous fact about the challenge is that it has been a reasoned and deliberate challenge It is not merely that the totalitarian state has behaved lawlessly both towards its own people and towards other states, that has happened before over and over again in the history of states by no means totalitarian It is that it has repudiated law in principle and made it an article of its creed that the administration of justice is merely one form of political action As Frank, one of the ministers of the Third Reich, once said, "Law is all that is useful to the German people" We may think that the case against law is a hopelessly bad one, but we ought to be prepared to give it a reasoned answer, for it is always possible to argue that government by law has certain disadvantages

#### "Philosopher" Kings

Plato put the case against it long ago in his dialogue, *The Statesman* Government, he says there, is a science, and the reason that those who are skilled in it use law as the instrument of their work is only because it is not possible for them to sit at the side of every man all through his life, like a doctor at the bedside of his patients, and prescribe the treatment that is suitable for each particular case They use law therefore, not because it is ideally the best, but because it is the best kind of government that is practicable In short, we need law only because we cannot find the all-wise philosopher king

Now, in the first place, such an argument greatly exaggerates the unadaptability of



PARLIAMENT YESTERDAY

*Parliament used to meet in St. Stephen's Chapel until a fire in 1834 (see pp 18-19) destroyed the entire building. The new buildings were opened by Queen Victoria in 1852. In the Second World War the House of Commons was partially destroyed by German bombs.*

law to particular circumstances. It is true that we account it a merit in law that it should be no "respector of persons", and we have a good working rule which says that "hard cases make bad law," meaning that if we allow the law to be turned from its regular course because to apply it to some particular case may cause hardship, we may very likely do more harm than good. Still, in a mature legal system the uniformity of treatment which law entails is qualified in all sorts of ways. Law does not require the same standard of behaviour from an infant as from a grown-up person; judges and juries are allowed to take many circumstances into account when they fix punishments or calculate damages. But more important than these alleviations of the rigidity of law is the fact that governments can, without allowing law to be displaced by arbitrariness—and indeed they must—provide *within the law* for a wide discretionary use of their authority by those in whom the law has vested it.

None the less, government by law does imply a measure of uniformity of treatment; it does mean that we often treat men as if they were exactly alike although they are not exactly alike, and therefore it is not unreasonable to say that it does not give us the ideally best ordering of society, but only, as Plato said, the best practicable ordering of it.

It is important to be aware of the disadvantages which follow from the uniformity of treatment which is of the essence of law, because, though we may think they are far outweighed by the advantages, they do reveal one of the limitations on its usefulness which it is dangerous to overlook. The disadvantages are not serious so long as the subjects of law are, though not exactly, yet very much alike, and that is true of individual men and women. But government by law becomes more difficult when it seeks to regulate and control the conduct of men who are associated together in the pursuit of some common

purpose. Observe the attitude to law of powerful groups or factions within the state. These groups and factions often resent, and sometimes the resentment is not unreasonable, a control which does not take their special circumstances into account. They feel that the control to which they are subjected ought to be, what law is not, a "respector of persons."

When we come to treat of international law, we shall see that one of the difficulties of making law more effective than it is in international relations is that the states to which it has to be applied are not nearly so like one another as individual human beings are.

Let us go back now to Plato's idea that, if only it were practicable, the best kind of government would be the philosopher king, requiring no laws or settled rules, but dispensing justice to his people after the manner of a physician treating his patients. There are at least two decisive objections to that, even as an ideal. There

is first of all the practical objection, which Plato himself admitted. The great Pitt said that "where law ends, tyranny begins," and, though theoretically that need not be so, in fact we know that it will be. We do not need to be reminded of that today. The all-wise philosopher king does not exist, and if he did, it is unlikely that society would set him on the throne. The only safeguard of liberty is therefore that we should live under settled law and not under arbitrary human will, even the most benevolent.

The other objection goes deeper. Government by the philosopher king, even if we could be sure of getting him, is a lower and not a higher ideal than government by law, because it would mean that the subjects of government were to be treated as passive and not active beings, mere clay to be moulded by the hands of the potter, and that is a profound psychological error. It implies that the quality of a government depends solely on the skill and beneficence



PARLIAMENT TODAY

*In contrast with the nineteenth-century print on the left is this modern photograph taken from a point slightly farther up the River Thames. Big Ben clock tower was added in 1859.*



## FIRE AT

*The fierce spectacle of the burning of the Houses of Parliament at Westminster in 1834 was drawn by the contemporary engraver, Heath. His engraving, of which this is a*



WESTMINSTER

*photograph, captures the drama of the event. Fire destroyed the entire building except Westminster Hall. Six years later building was begun on the present Houses of Parliament.*



of those who rule, and not, as in fact it does far more, on its capacity to call forth the active and intelligent co-operation of the ruled.

This discussion of the comparative advantages of government by law and of other forms of government, however, is only relevant when we are thinking of law as a method of meting out social justice, a means of rendering to every man his due. But that is only one part of the function of law, though of course a vitally important part. In a vast number of legal rules there is no question of justice or injustice, they are ethically neutral. They are needed simply in order to avoid confusion in our social relations and often it does not matter what the rule is so long as there is a rule of some sort.

The rule of the road provides an obvious example of this use of law, it does not matter whether we drive to the right or to the left, but it does matter very much that we should all drive on the same side, and it matters the more the denser the traffic becomes. That only illustrates the obvious fact that we are bound to need more and more of this kind of regulation in our lives the more complicated our civilization becomes. Such regulation is often intensely irritating, and sometimes the authority to regulate us may be unwisely or unnecessarily exercised. But that laws of this type are and always will be necessary is absolutely certain. The need will not disappear or even be reduced however much wiser and better men may become than they are today.

#### Conception of Sovereignty

A state in which the government rules by law and not arbitrarily is a "constitutional" state, for a "constitution" is simply the sum of the rules which define the authority to be exercised by the various organs of a government.

But before we discuss the meaning of "constitutional," we must say some thing about the doctrine of sovereignty, for according to one version of that doctrine a genuinely constitutional state cannot exist. There must, it is said, always be some authority in every state

which is above the law. The short and sufficient answer to this view is that the facts are against it. Sovereignty is such an elusive concept, and so much confusing nonsense has been written about it that it would conduce to clearer thinking in political theory if we could simply eliminate the term from the discussion but that unfortunately is too much to hope for.

#### Medieval View

It is best to approach this question historically, for the whole doctrine of sovereignty is modern, dating from the sixteenth century, and that alone should warn us against regarding it as eternally true regardless of times and circumstances.

Like most political doctrines it was the product of the special conditions of its time, and the reason why the political thinkers of the Middle Ages never thought of formulating it was simply that the circumstances which suggest it had not then arisen. The Middle Ages saw no difficulty in the subjecting of all authority of government to law, on the contrary they thought it was in the nature of things that it should be. This was because they believed in a fundamental law which defined and therefore limited every legitimate exercise of power in a state. There was of course no written text of this law, and there might therefore be differences of opinion as to what it contained, but these differences did not affect the belief that all legitimate power must have its source in law, nor did the lawlessness which was an often recurring event then as now.

There was nothing inconsistent with this medieval belief in a fundamental law in the original form of the doctrine of sovereignty, as it is to be found, for example, in the *Republic* of Jean Bodin, which was published in 1576, and is generally regarded as its first formulation. Bodin's sovereign was a purely legal concept, he simply thought that the mark of a true state was that it should contain a single supreme law-making authority, because, if that authority was divided between different holders, the state would not be a unity. Division and conflicts of authority had been the weakness of the medieval state, feudal divisions

and the recurring quarrels between the secular and the ecclesiastical powers as to their respective spheres of jurisdiction had prevented the consolidation which Bodin felt was necessary for good and orderly government. Bodin had lived through a period of bitter civil war caused by these divisions, and he wanted to see France strong and orderly and thought that to make the French monarchy supreme over all other authorities in the state was the way to secure this end. But he did not teach, as he is often represented to have done, that this monarchy should or must be absolute; he did think that it should be very strong and powerful, but he also thought of it as a legally constituted power, deriving its authority from the fundamental law of the state which it was not in its power to change. If he had been thinking in modern terms, he would have said that the sovereign's powers were to be derived from the "constitution."

Bodin's supreme authority therefore was not, at any rate in theory, inconsistent with the rule of law; it was not an authority above the law. But if that is so, how is it that to our modern minds sovereignty so often suggests a power in the state which is absolute, which is above the law? There are two main explanations of that unfortunate development of Bodin's original and perfectly reasonable doctrine.

In the first place there had always been one great weakness in the medieval doctrine of the fundamental law: it contained no safeguards to secure its own observance. It set limits to the authority of the ruler, but no one could say exactly where the limits lay, and no one could say with authority that the ruler had overstepped them. In effect the fundamental law placed only a moral, rather than a strictly legal,



#### TRIAL BY BATTLE

*Among tests of guilt in medieval law were trial by ordeal and trial by battle. The ordeal was an appeal to God to reveal the truth by a miracle, its usual forms were the ordeals by red-hot iron and by water. It was forbidden by the Church in 1215. Trial by battle, of which an example is seen in this fourteenth-century manuscript painting, was a special form of ordeal, the theory being that God would make the truth prevail.*

restraint upon the holders of power within the state. Power therefore could be, and it often was, arbitrarily exercised. But in the medieval state it could not be absolute, either in theory or practice. A theory of absolutism was impossible because men believed that by the very nature of things the fundamental law set a limit to all rightful exercise of power; and absolutism was impossible in fact because power was divided between different holders who did not derive their authority from one holder of power supreme over all the others, in short from a sovereign, but held it independently each in his own right.



QUEEN ELIZABETH

*Her reign saw the flowering of the idea of nationalism and the consolidation of power both temporal and spiritual in the sovereign—the furtherance of a process initiated by her grandfather, Henry VII.*

With the decay of feudalism, however, and the weakening of the independent power of the Church, which was one of the consequences of the Reformation, this state of things was passing away in Bodin's day. Throughout the states of Western Europe authority was being concentrated in a single supreme holder, Elizabeth's Act of Supremacy, for example, declared her to be "the only supreme governor of this realm, as well in all spiritual and ecclesiastical things or causes as temporal."

To this process Bodin gave a doctrinal expression; for it he sought justification. But this concentration of power made the weakness of the fundamental law as a restraint on arbitrariness and absolu-

tism a more serious matter than it had been when authority had been divided and no holder of it had either been in fact or could even claim to be an "only supreme governor" in the realm. Bodin may not have intended his sovereign to be absolute or above the law, but it was almost inevitable that, being his own judge of whether his acts were within the law, his sovereign should in the new conditions of the time come to be so regarded.

The second development which helps us to understand how the notion of absolutism has come to be attached to that of sovereignty is that in the seventeenth century the doctrine was given a wholly new turn by Hobbes, and most of the exponents of sovereignty since then have been followers of Hobbes rather than of Bodin. For Hobbes the sovereign was not the highest legally constituted authority in the state, but simply the strongest power, the power that is able to compel obedience to itself, and because it is able to compel obedience the duty of the subject is to

obey it. This was also what John Austin taught in the early part of the nineteenth century, and Hobbes and Austin together have largely shaped the thought of the English-speaking peoples on the subject. But fundamentally their doctrine is nothing but a justification of despotism, and despotism is despotism whether the despot is a personal autocrat or the sovereign people or the personified state. Might, in fact, according to this perversion of the doctrine, makes right. The reasoning is sound enough, but fortunately the premises from which it starts are not, and the conclusion therefore is false.

What went wrong with the theory of sovereignty from the seventeenth century

onwards was that irresistible power was substituted for legal right as the attribute by which we are to recognize the sovereign. It ceased to be a legal doctrine with the limited and special application which Bodin had given it, and was expanded into a political theory professing to explain almost the whole nature of the state.

#### Power and Law

Clearly the strongest power in the state, wherever it resides, cannot be limited by law or anything else, since otherwise it would not be the strongest, and if we call that power the sovereign, then it will follow that the sovereign must be absolute and above the law. But there is no logical or other difficulty in conceiving a state in which every holder of authority, every person or body in whom a right to govern is vested shall have the extent of his authority defined by law. This was what the Middle Ages believed, and they were right. Whether in any state the highest legally constituted authority is supported by the strongest power is another matter, obviously the two things do not always go together. When they are separated from one another, there is likely to be revolution. But it never can be the subjects' duty, as Hobbes and Austin would have us believe, to obey the holder of power merely because he is strong. Such an account of the nature of political obligation is not really distinguishable from that which Plato's Thiasymachus put forward.

In most modern states the rules of the constitution, that is to say those fundamental rules which apportion the authority of government among the different persons or organs who are to exercise it, are brought together in a written document. This device has enabled the modern state to correct the weakness in the medieval concept of a fundamental law which has been referred to above. No written constitution, however, ever contains a complete statement of these rules, it is never more than the skeleton, and the flesh which makes of it a living body is formed by the accretion of traditions and conventions which are perpetually being evolved in the course of its operation.

Indeed, written constitutions are a modern innovation, the oldest written constitution of an independent state is that of the United States of 1787, though before that the American colonies which made the Union had been living under written constitutions which had been granted by the mother country so that such a framework for government was no novelty to Americans.

When a state is a federal state, like the U.S.A., a written constitution is essential, because otherwise there could be no security for the permanence of that division of powers between the central and the local governments, which is the essence of federalism. That, however, is a matter which will be more fully developed in the chapters of this book dealing with the United States and with the British Dominions. Many states, however, which are not federal have also preferred to put their constitutions into written form. They may wish to make an easily recognizable distinction between constitutional and other rules, and perhaps to give a special sanctity to the former by providing some special method for making changes in them. Again, when the whole system of a state's government is being recast, as it has been in recent years in France and Italy, a written constitution is necessary.

#### Britain's Position

But a constitution may be just as real although it has not been put into written form, for it would be absurd to say that no state ever had a true constitution until the United States started the fashion, and equally absurd (though it has been said) to say that Britain has no constitution today. Of course we have a constitution, though we do not make a formal distinction between constitutional and other laws, and the same body, Parliament, can change or abrogate any law whatsoever and by the same procedure. The phrase "the sovereignty of Parliament," of which the implications will be dealt with more fully in Chapter III of this book, expresses this theoretically absolute power, but as an American writer, Professor McIlwain, has pointed out, that is really nothing but a



ADOLF HITLER

*The distinction of this man's absolute rule was not the murder and imprisonment of opponents, the regimentation of a people nor the preparation for a war of conquest. Rather was it the development of scientific methods in propagating lies, in working captives to death, in exterminating "useless" populations and in devising for whole nations varying conditions of slavery. The distinction of his country is that the majority of its inhabitants accepted his rule, his party, his objects and his morality.*

fiction if it means that Parliament can do anything it likes. We all know that Parliament cannot, that there are a host of moral and political checks which limit its powers as surely, though not, of course, as precisely in matters of detail, as if they were written down.

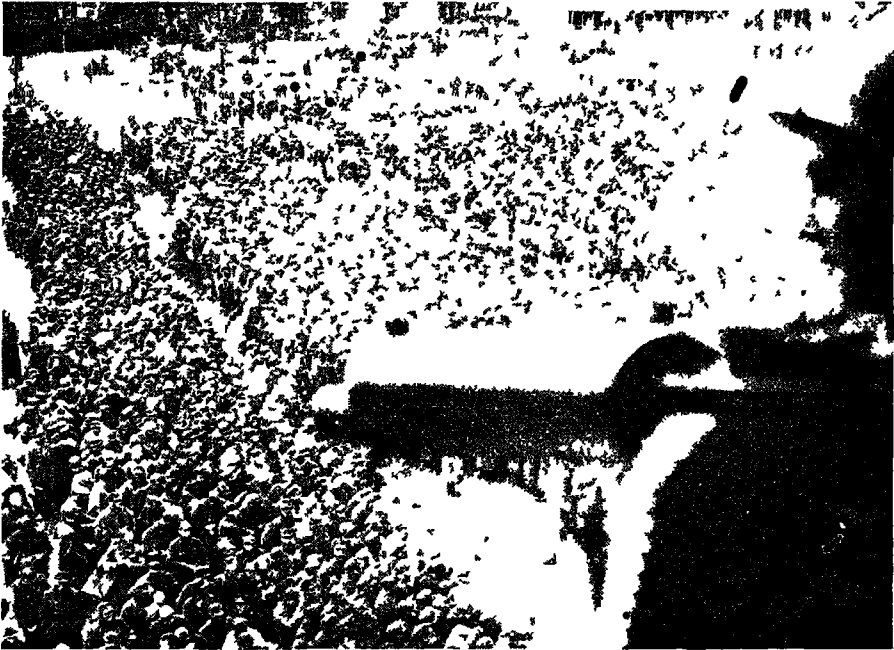
One result of our conservatism is that the British student of the Constitution is in a position not very unlike that of the medieval lawyer with his concept of a fundamental law of the state; neither of them has a formal text of the constitution to which he can appeal.

Professor McIlwain has added an

explanation of the reason why we have not followed the fashion and put our constitution into a written document beyond the reach of Parliament to change by its ordinary procedure. He thinks it is because the limitations on arbitrary rule have become so fixed in our national tradition that no threats against them seem serious enough to necessitate a formal code. That is a testimonial which Englishmen may be proud to receive; it should make them resolve that they will continue to deserve it

#### Responsible or Arbitrary Government

Constitutionalism or absolutism, government by law or government by the arbitrary will of a ruler or a ruling class, is the issue which transcends in importance all other political issues in our time. It is an old issue revived in a far more dangerous form than ever before. The vastly increased complexity of modern government, which is rendered inevitable by the vastly increased complexity of our industrialized civilization, has made strong government far more necessary than it has ever been, order is the most elementary of all our social needs. But can a constitutional government, a government in which all exercise of power is defined and limited by law, ensure this order? It can give men liberty, but if men come to doubt, as in many countries they have done, whether it can also give them order, they will be ready to sacrifice everything else to satisfy this primary need. They will give up the struggle, and throw their responsibilities on to the leader who offers to take them on his own shoulders. And today, when that surrender has once been made, the despot can fix his yoke with a firmness never possible before. There can be no going back; no rising against the tyrant who turns out after all not to be the benevolent tyrant of men's imagination, both because he can now command a physical force against which resistance is hopeless, and because he has learnt how to "condition" the very thoughts of his subjects to tolerate his rule. Somehow we have to see that constitutionalism shall be given the power which alone will enable it to establish *both order and liberty*.



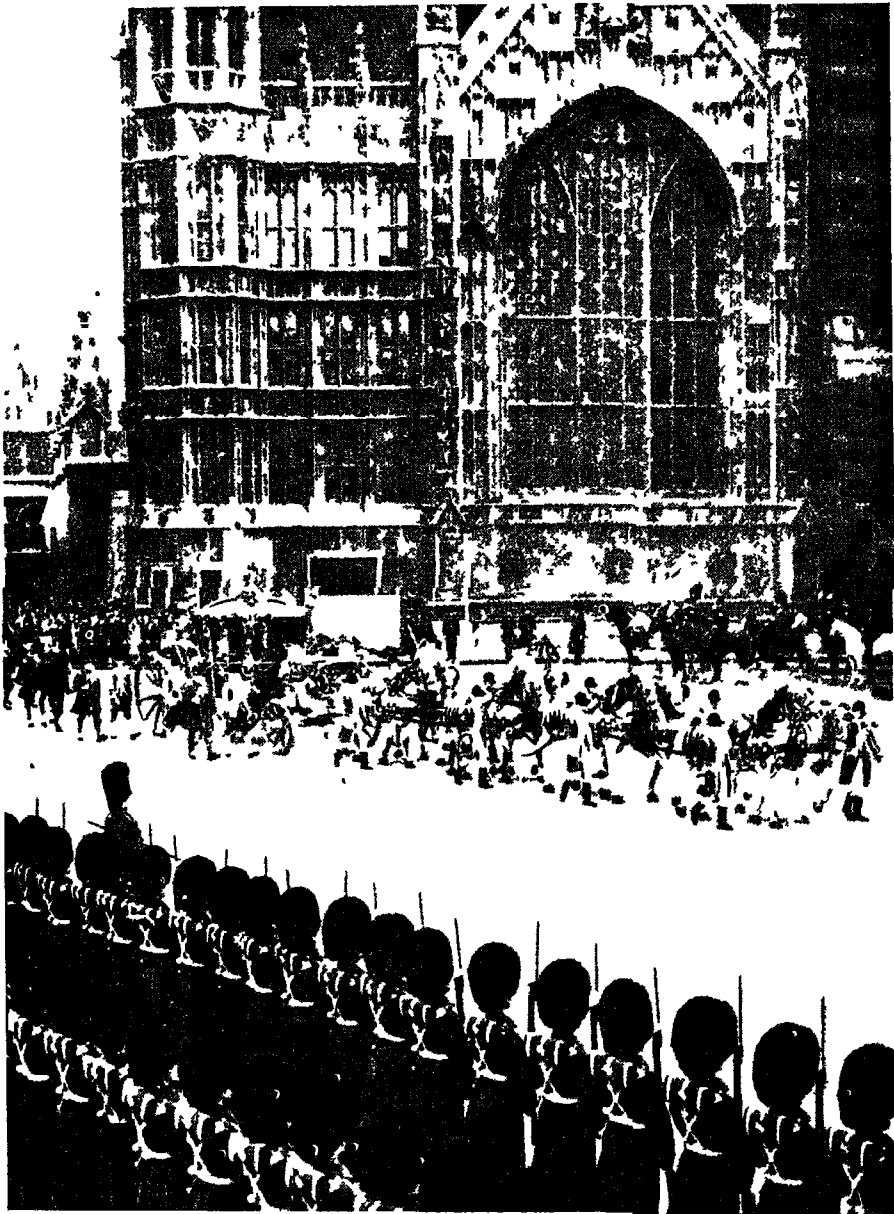
### END OF THE MARCH

*To those who listened to the youth of the Fascist nations while, for a decade before the war, they drilled and sang, the question often came to mind: 'Whither are they marching?' They had not the remotest idea. Obedience had been substituted for thought.*

### Test Yourself

- 1 What is the doctrine of the Social Contract?
- 2 What is the fallacy which underlies all forms of the doctrine of the Social Contract?
- 3 Give a simple definition of law
- 4 What was Plato's idea of the best form of government?
- 5 What are the objections to this form of government?
- 6 In many legal rules there is no question of justice or injustice, why then are they necessary?
- 7 What is a "constitutional" State?
- 8 What is the main difference between the doctrines of sovereignty of Bodin and Hobbes?
- 9 Why has Britain no written constitution?

*Answers will be found at the end of the book.*



KING GEORGE VI AT STATE OPENING OF PARLIAMENT

*In the English system of democratic government the reigning sovereign is nominal head of the State although he has now no direct political power. His function is consultative. The Parliamentary year begins in October and normally there is a state opening by the sovereign at which a speech from the throne outlines the intended policy of the government.*

# THE MEANING OF DEMOCRACY.

THE *Oxford Dictionary* defines democracy in these terms: "Government by the people, that form of government in which the sovereign power resides in the people as a whole, and is exercised either directly by them (as in the small republics of antiquity), or by officers elected by them. In modern use often more vaguely denoting a social state in which all have equal rights, without hereditary or arbitrary differences of rank or privilege."

This definition warns us that we shall find the word democracy used in more senses than one, and that is one of the difficulties of discussing the subject; too often the parties are at cross purposes, and the same person may easily pass without being aware of it from one sense to another. Originally there is no doubt that democracy is a political term, denoting a particular form or method of government, and this is still the most convenient usage of the word. But it has also acquired a secondary meaning in which it refers not specifically to the form of government, but to the habits or manners of the members of a society among themselves. The political and the social meanings are obviously closely connected, for when a nation is democratic in the first sense, its members are likely to regard themselves as socially equal to one another and so to be democratic in the secondary sense. But the two things do not always go together; for instance, in some ways British government is probably more democratic than the American, but socially Americans are more democratic than we are, or at any rate than we were until very recently.

But even if we decide to use the word democracy primarily, at any rate, as a political term, the ambiguities in its meaning are not at an end. Recent international controversies have made that painfully evident. The statesmen of the Soviet Union appear to use the word in a sense very different from that which it bears to us in Western

Europe or America. Mr. Vyshinsky, the Soviet Vice-Commissar for Foreign Affairs, was reported to have made a speech in which he said: "Democrats are those who give their efforts to the service of the people, who are ready to sacrifice their lives, who work for the people, for peasants, workers and intellectuals, for all who with their labour and toil create the things which they have the first right to use." This would make the distinction between democratic and other forms of government turn on the *purpose* for which the powers of government are used, whereas to our Western minds it turns on the way in which these powers are organized; even a pure autocracy, which to us is the very opposite of a democracy, might be a democracy in Mr. Vyshinsky's sense, provided only that it was a genuinely benevolent autocracy, and indeed Lenin is reported actually to have used the phrase "a democratic dictatorship." That, on the Western view of democracy, is an expression to which it is quite impossible to give any intelligible meaning.

## Democracy in its Western Sense

There seems, in fact, to be a tendency for people to describe as democratic that form of government of which they most approve; the word is in danger of becoming merely a laudatory epithet. That may be partly due to the prestige that democracy acquired in the nineteenth century; the nations which then seemed to be making the best success of the business of government were those which were beginning to profess democracy as their ultimate ideal and were in many respects proceeding to democratize their institutions. Democracy was the fashionable political creed, and there was a feeling that a nation which desired to stand well in the world must at least profess the democratic faith, and outwardly at least, remodel its institutions according to the democratic pattern. The Nazi and Fascist



dictators used to provide a ludicrous illustration of this tendency, for their references to democracy used to alternate between vituperative abuse of democratic ideals and practice and boastful claims that their own systems were the only genuine embodiments of democracy.

Words, no doubt, as Humpty Dumpty told Alice, can be made to mean just what we choose them to mean, but it is a real barrier to international understanding that we do not all of us choose to make the word democracy mean the same thing. In this chapter we shall use it in its Western sense. We shall not admit that a government is democratic merely because it may be a good government, nor that a government which adopts democratic forms is necessarily a good one. Democracy is in fact, a very exacting form of government, it needs certain rather exceptional conditions if it is to succeed, and when these conditions are not present and a government none the less persists in giving its institutions a democratic veneer, it can be a very bad form of government indeed. There is truth in the charge that by encouraging nations, which were not ready for democracy to adopt democratic forms, the Treaty of Versailles paved the way for the dictators.

#### Democracy in Practice

There is still another difficulty in discussing democracy. It is that there is not, and there never has been, a fully democratic state to serve as a model for analysis. There are only states which are more nearly democratic than the general run of states, states which profess to believe in democracy and try more or less consistently to purge their institutions of those non-democratic elements which have been handed down in every constitution from the past. One of the points which it is most important for the student of democracy to realize from the outset is the novelty and the rarity of democratic ideals in the history of government. Democracy is not and never has been a realized fact, it is an ideal which a small minority of mankind have sometimes adopted as the aim of government. But if it is a positive ideal, it is not to be identified

merely with anti-fascism or "anti" any other particular form of government. The purpose of this chapter is to try to discover the essential elements of which this ideal consists.

There is one popular conception of the meaning of democracy which we can dismiss at once as altogether too simple. Democracy is a Greek word, and literally it means "government by the people." But that will not do. A whole people cannot govern. Even in the small city states of antiquity they did not do that, even if, when we speak of "the people," we exclude, as they did, the slaves. It is only in the very simplest and smallest of societies that all the members can do the work of governing, and a society which is political is never so simple as to make that possible. In any modern state the notion of the whole people governing is merely absurd, they might as sensibly decide all to do their own plumbing or any other kind of necessary work that requires special aptitude and skill. Actual government is always and inevitably the business of a few, and, although it may sound paradoxical, it would be true to say that in a sense all governments are oligarchies and cannot be anything else.

Still, the literal meaning of the word democracy is not to be neglected, for it contains a clue which it is necessary to follow up. It does truly inform us that the essence of democracy is to be found in a certain relation between the whole people and those who carry on their government. If we can discover what relation that is we shall know the meaning of democracy.

Stated in its simplest terms the essence of the democratic faith is that every human being ought to count as an individual and in his own right in the state. The democrat holds that no man ought to be treated merely as a means to other men's ends, as cannon fodder for an army, for instance, or as a "hand" in industry. He holds, too, that it is not merely the interests of every individual that ought to count in government, forms of government other than the democratic may act benevolently towards the individual and make his



## THE RIGHT TO DISAGREE

*No man ought to be treated merely as a means to other men's ends. So thinks the democrat. But when civilization reverts to barbarism what happens? The wire entanglement of the twentieth century is cheaper but no less efficacious than medieval stone and chain.*

interests their primary concern, and perhaps look after them more wisely than he will himself. But that is not enough. A man is himself, an individual human being, possessed of capacities for development which ought not to be barred. His wishes and opinions, even his prejudices, ought to count as well as his interests; he must have the opportunity to express them, and the right to have them weighed as part of the process by which the common policy of the community is formed.

This ultimate value of the individual for his own sake, which democracy asserts and from which all political philosophy ought to start, is sometimes obscured by metaphors which we use to bring out some particular aspect of the relation in which the state stands to the individuals who compose it. Metaphors from mechanics suggest that the individual resembles a cog in a machine, and metaphors from biology that he is like the limb of a body, the "body politic," which is the state. Such comparisons are

often instructive, but when they are taken literally, as they too often are, they can become utterly misleading. They obscure the essential fact of the separate human personality of every member of the state.

Perhaps at this point it may be desirable to guard against a possible misunderstanding of what has just been said. When the democrat insists on the ultimate value of the individual, he is not to be taken as ranging himself on the side of that theory of the object of government which we call "individualism" in contrast to collectivism or socialism. That contrast raises a totally different issue, and a state may pursue either policy without ceasing to be a democracy. The opposite of the democratic view of the individual in the scheme of things is not collectivism, it is the totalitarian view, the view which was expressed, for instance, by Mussolini when he wrote that "everything is in the state, and nothing human or spiritual exists, much less has value, outside the state."

Outside the state there can be neither individuals nor groups, political parties, associations syndicates, classes

The democracy's faith is that the state exists for the sake of men and not to be their master. It has been expressed by Dr Figgis in his *Churches in the Modern State*, in words which we may set beside these terrible words of Mussolini "Whether the doctrine of omnipotence be proclaimed in Church or State, whether it take the form of monarchy by divine right or the sovereignty of the people, always and everywhere this doctrine is false, for whether or no man can frame a logical theory to express the fact, the great fact at the root of all human society is that man is a person, a spiritual being, and that no power—not even a religious society—is absolute, but in the last resort his allegiance to his own conscience is final"

#### Achievements of Democracy

This claim that we have been making for democracy may seem unreal or even hypocritical when we compare it with the achievement of any actual professedly democratic state, and the anti-democrat has no stronger debating point than this contrast between the loftiness of the ideal and its imperfect realization. But almost any creed can be made to look ridiculous by contrasting its profession with its practice. We shall see, too, later, that most of the defects which are developed by democracy in practice are not peculiar to it, they are defects in the practice of the difficult art of human government, and they are only more conspicuous in democracy because they stand in greater contrast with its professions, and because they are more likely to be seen by all the world and therefore to be made the targets of public criticism.

There is also another answer to the critic who points triumphantly to the failures of democracy. No fair-minded man who looks back on its achievements in the short period, not more than about two generations, during which the democratic ideal has been generally accepted as the aim of law and government in, for example Britain, will be inclined to sneer

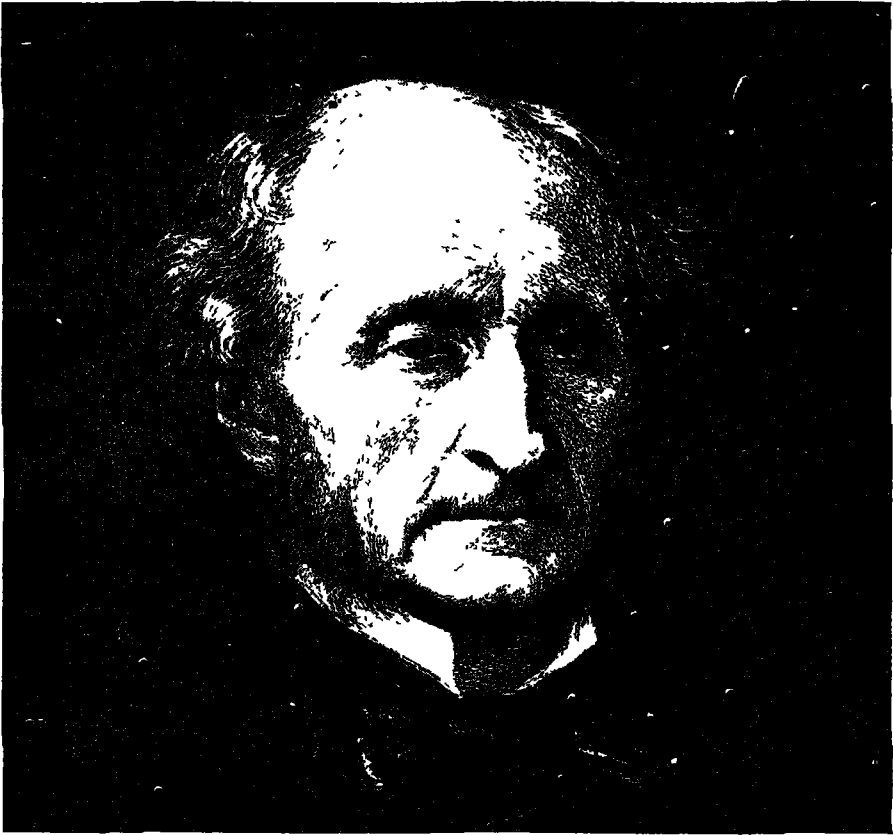
at what has been done, by improvements in the lot of the ordinary man to assert the value of the individual in his own right and not as a mere anonymous unit in the mass.

During the Second World War Mr J. R. Clynes wrote a very remarkable little pamphlet entitled *When I Remember*, and in this he contrasted the life of the average Englishman today with what it was when he was a boy. "England has been changed," he wrote, "as though at the sweep of a wizard's wand. But there was no wizard. We have had a revolution, too, and I think it is time we spoke of it aloud for dictators to hear."

It is another way of expressing this value, which democracy sets on the individual, to say that it refuses to identify the state with the whole of society. It holds that the state is merely one aspect of society, a very important aspect certainly, but still only one amongst others. The state is society organized for political purposes, for the purposes of law and government, and it must not claim, and must never be allowed, to absorb all our social relations and purposes. Once it does so, that is totalitarianism, in whatever guise it may present itself.

#### Loyalties of the Democrat

The democrat holds that outside the state not only does every man exist as an individual in his own right, but that he may and should have other loyalties, to church, parties, unions, clubs, to innumerable associations which he forms freely for himself, and which the state no more creates for him than it creates the family into which he is born. These other non-political associations have a social value which is inestimable. Not only do they bring variety and interest into the individual's life, but they are the very stuff which makes it possible for a democratic system of government to be a success. They lead to the perpetual interchanging of ideas between man and man, and so to the understanding of the other man's point of view and the recognition that our own is not the only reasonable one. Thus they tend to make men tolerant of their



JOHN STUART MILL

*Heir to the theories of government of John Locke and Jeremy Bentham, John Stuart Mill greatly influenced nineteenth-century political thought with his essays "On Liberty," and "Representative Government." He was not so strictly in support of Bentham's utilitarianism as to be unaware that the individual in society must not be submerged by the mass.*

differences and more ready to work together in spite of them, and that spirit is essential to make democracy a success.

How does democracy set out to translate these ideals into practice? The first essential is so to organize the machinery of government as to ensure that the holders of governing power shall be accountable to the people as a whole for the use to which they put it. Power which is responsible to no one cannot be trusted to be or at least to remain benevolent. Democrats believe that Lord Acton was right when he wrote in a passage which has been

quoted many hundreds of times, but which is still true, that all power tends to corrupt, and absolute power corrupts absolutely. We can believe that without subscribing to a view which history has contradicted over and over again, that those who govern always do so in their own interests or in the interests of the class to which they belong. That extreme view is just as untrue as it would be to say that by some law of our nature we are all of us purely selfish all the time; which in fact was just what Hobbes did assume as the foundation of his political

theory, and what makes of *The Leviathan*, for all his genius, one of the most misleading books ever written. The reason why power should always be made accountable to the people is not that otherwise it never would be used in the general interest but that it may not be, and it is better to be on the safe side.

#### Inefficiency of Despotism

But there is another and a deeper reason which ought to lead us to the same conclusion. It is one that John Stuart Mill pointed out long ago in his *Representative Government*. Despotism, he said, however enlightened and efficient it may be, is never the best form of government, because it cannot produce the highest type of men, and the ultimate test of the merit of any government is the quality of the men that it produces. The object of government is not merely to make men comfortable and contented, it is also to educate them, or to create an atmosphere in which they can educate themselves, in short, to make a nation not of robots, but of men who can contribute something to the common good and not merely accept its bounties.

The making of power accountable to the whole people involves an important question in the theory of democracy, the question of the part that consent does or can play in government. Are we to say that democracy is just another name for government by consent of the governed, and if we do say that what exactly do we mean by it?

Some writers have told us that government by consent is a contradiction in terms, because the very object of government is to compel men to do what they do not want to do of themselves. Government must therefore rest on force. On the other hand, others have said exactly the opposite and argued that government always rests on consent because it can rest on nothing else: it ceases to exist if the governed refuse to obey, and that is true even of a dictatorship. Both these answers are too simple, but the second is nearer to the truth than the first.

The substratum of truth in the first view

is that a government can never dispense altogether with the command of force, it must be able to compel men to do what they do not want to do, or to prevent them doing what they do want to do. That is true, but it is also true that if a government has to use force except in emergencies and against malcontents who are in a minority it will not last long. Hence it is not true to say that all government rests on force, for it is only by the consent of the governed or of a sufficiently strong part of them that a government can be empowered to use force. In that sense, therefore, it is true to say that government does and must rest on consent, but since that is true of all government, the consent of the governed cannot be the chief quality that distinguishes democracy from the other forms.

#### Consent of the Governed

In any case this popular explanation does not help us much towards understanding the essence of democracy, for as soon as we begin to test the consent explanation, it breaks down. It is manifestly untrue, for example, to say that in a democracy every individual must have a right to consent or not to consent to every act of government, no system of government would be workable on those lines, and democracy must at least show that it is a practicable system. Nor does it help the argument to say that we must be taken to consent to all governmental acts through those whom we choose to represent us, in any case that would be a fiction, for when we elect our representatives no such attention as that is present to our minds, and we may even have done our best to prevent our so-called representative from representing us by voting against him, or he in his turn may have voted against the particular measure of government to which it is sought to show that we have somehow consented by proxy.

On the whole the true relation between government and consent seems to be something like this: that no government can long endure unless the majority, or the strongest part of those who live under it, consent to accept the system under which

the government is conducted. Consent in detail is not necessary, but acceptance of this system as a whole is. That applies to all government, and to that extent it is immaterial how the consent has been produced. It may be the result of intellectual conviction, or of mere habit or inertia, or of the mass hysteria which totalitarian technique has carried in our days to heights hitherto undreamed of. That which distinguishes democracy from other forms of government in this matter of consent is only that there the consent is both widespread and freely given by men to whom the means of forming their own opinions are open if they choose to use them.

The mechanism whereby democracy in modern times has tried to secure that governments shall be accountable is representative government. It may be that other means could be devised, but it does not appear that anyone has yet done so, and for practical purposes we may take it that modern democracy is a form of representative government. That does not mean that representative government is necessarily democratic. Britain had a system of representative government in the eighteenth century, and even later, which made government accountable, though only to a privileged minority, but this was not a democratic system, and very few people had then conceived the idea that it ought to be. To make representative government democratic it must be made accountable to the people as a whole, and the practical means of doing this is that all should share in choosing certain persons who are to 'represent' them in the machinery of government, that is to say, that every man and woman not disqualified by youth or mental incapacity or in a few other ways, should be given the right to vote.

This democratic insistence that some control over their own government ought to be given to the whole people needs defending, for on the face of it it is not obviously a sensible arrangement. Even the most enthusiastic of democrats does not believe that all the people are wise and good, or that all of them have either the time or the inclination or the capacity

to understand the intricate and often very technical questions that come up for decision in modern government. He knows quite as well as the anti-democrat does, that the opinions of the average man on, say, the gold standard, or the nationalization of this or that industry, or the future of Indian government are worthless, and that if a great number of average men join together to try to dictate governmental decisions on such matters as these they may easily produce a dangerous situation for the country. Yet though he recognizes all this the democrat persists in thinking that the average man ought to have a voice to which the government must listen.

But what sort of a voice should it be? Not, it seems, for the reasons which have just been mentioned, a voice in deciding every particular issue on which the government must take a decision. That is 'direct' democracy, or 'democracy by plebiscite' as it has been expressively called, and the literal meaning of the word government by the people rather suggests that democracy ought to be made as direct as it can be. There is a temptation to regard government by the whole people as the ideal, and to say that, though we have unfortunately to recognize that its full realization is not possible, still any device which brings us nearer to it must be democratic. But there are many dangers for democracy if democrats yield to this temptation.

#### Dangers of Direct Representation

One danger is that to decide particular issues of government in this way is not at all likely to produce wise decisions. It may be useful in exceptional cases to ask the whole people to say yes or no to some very important proposal, no doubt it was right to submit the new draft of a French Constitution to be decided by referendum as was done. But most questions cannot be well decided by this method, and if the people are asked too many they will lose interest and the answers will cease to represent a definite opinion of any value.

Another danger is that to place power of direct government in the hands of the people as a whole inevitably weakens the



#### NAPOLÉON—FROM DEMOCRAT TO TYRANT

*Napoleon was hailed as a liberator when he first came to power, but as his hold on Europe grew more potent he found himself in the role of a tyrant. This was the part that James Gillray cast him for in a series of savage caricatures—this one showing Napoleon as a baker producing from the oven his latest batch of kings.*

position of the actual government, and weak government is always bad government. That is one of the hardest lessons that the democrat has to learn. Yet experience shows that nothing more surely paves the way to dictatorship than weak and inefficient government, and that has become more true than ever in our own days, when men's ordinary lives and livelihoods depend so intimately on the maintenance of a stable order in the state. Men will put up with very evil forms of government if they become convinced that only by doing so can their elementary need for order in their daily lives be satisfied, and that is just what the would-be dictator promises them.

Democrats have always been tempted to identify democracy with weak government, and perhaps part of the explanation lies in the history of democratic theory. Some of the early democrats did frankly

think that weakness and democracy went together, but that was because in their day the fight for democracy necessarily took the form of attacking the abuses of strong non-democratic power in existing governments. They were less concerned with the question of what was to be put in the place of this power when it had been destroyed, and they had more confidence in the rationality and essential goodness of men, if only they could be released from tyrannical governments, than we have today. The democrat of today has no such excuse. His task is not how to destroy, but to construct, to make democracy efficient so that it can hold its own in a dangerous world.

There is another danger, more insidious than this, in supposing that democracy ought as far as possible to retain its original etymological meaning. If we believe that the whole people ought to govern, we shall

be tempted to go a step further and hold that there can be no legitimate limits to the people's powers, and to say that is to take the first step towards totalitarianism. That is what makes any doctrine of the "sovereignty of the people" so dangerous to true democracy, it converts democracy, which starts with respect for the individual as its fundamental tenet, into the despotism of the mass. French experience has confirmed this view of the natural consequences of the doctrine more than once, their Revolution, which started with liberty, equality, and fraternity for its slogan, ended in Napoleon. Absolute power is inconsistent with democracy whether it rests in the hands of the people or of an autocrat: it is only if a government is constitutional that it can be democratic, a government, that is to say, which is precluded, either by law, as in the United States, or by tradition and convention as strong as any law, as in Britain, from too great intrusion on the fundamental liberties of our private lives.

#### The People's Choice

All this leads to the conclusion that representative democracy is not a second-best brand of democracy which we put up with only because direct democracy is impracticable. It is the genuine article, because it places on the people as a whole a function which they are qualified to perform, and not one which is beyond their range and dangerous for them to undertake. All that it requires us to believe is that the people as a whole are capable of pronouncing on the broad issues of politics, and especially of choosing the leaders by whom they will be governed, and of changing those leaders when they think that other leaders would do the job better.

To believe that does not strain our credulity. Even if the people make mistakes, as of course they will, the democrat still believes that this function of ultimate control ought to belong to them. He remembers that it is the life of the ordinary man that acts of government will affect, and that the best way of ensuring that those interests will be fairly treated is to

let him have his say, and he knows that unless he is allowed this say, the government can never be sure how far it can lead him, and whether he will back it in the policies to which it is bound to commit the country, and which can only be effective if he does.

#### The Alternative

But the final and decisive justification for making government accountable to the people is that the alternative—non-democratic government—imposes on the governed an indignity to which no man or woman should be required to submit namely, that of being treated, however benevolently, as merely an object of government. Just as in economic life no one should be required to live on charity, so in political life no one should be expected to live at the mercy of irresponsible rulers. This ultimate justification of democracy has been eloquently put by a recent writer Dr. Schwarzschild, in his *World in Trance*: "More than ever before," he writes, "have we reason to think that democracy is relatively the most desirable form of social organization. But less than ever before have we reason to think that democracy is desirable because it is an automatic expression of collective wisdom. Democracy is desirable for entirely different reasons, because it alone tends to secure the indispensable minimum of freedom, rights, and dignity for the individual. But as far as wisdom is concerned, the will of the people is as confused and questionable a source of decision as any other. The best democrat is not the man who denies this, but the man who knows it and remains a democrat notwithstanding."

The mere right of voting does not of itself take us very far towards the realization of democracy. It existed in Hitler's Germany, and Germans were frequently called upon to exercise it. Whether the right to vote is more than an idle formality depends upon how it can be exercised, on whether the voter can cast his vote for a candidate of his own choice. But even if a man is free to vote exactly as he likes, he can only vote effectively if the electorate is organized, and this brings us to the



importance of the function that political parties perform in the practical working of democracy. Men do not by nature all think alike, though the modern totalitarian states have discovered methods by which they can almost be made to do so and those few who persist in thinking for themselves be made at least to act as though they thought like the majority.

In a free state it is certain that there will be an almost infinite variety of political opinions, and the formation of parties is absolutely essential to avoid the chaos that would otherwise ensue. Even the members of the same party will not all think alike on every matter on which the party has to take a line, indeed, some compromise in our opinions is essential to enable parties to formulate and propagate their programmes, and to preserve the unity without which they cannot act effectively at all. To sneer at such compromise is to criticize life in general. For no society whatever can exist unless its members are willing to defer to one another, and to compromise on non-essentials.

It is true of course there is a limit, and everyone must decide for himself when it is reached. But we choose our party because we think that on the whole we are likely to find ourselves agreeing with most of the views that it will advocate, and we know that if it strains our loyalty too far we can leave it and join another.

#### Opposition a Necessity

That implies of course that there must be more than one party in the state. The one-party state is literally a contradiction in terms, the very word "party" implies that there are others outside it, and the "one-party" state can only mean that one section of the people arrogates to itself the sole right to organize itself for joint action in political affairs and denies the rest the right to organize themselves in a similar way. More than one party is essential, too, in the working of democracy because if a government is to be made accountable it must be exposed to criticism, and effective criticism must be organized and can only be brought to bear by col-

lective action. Thus a tolerated opposition is as much an essential part of democracy as the government itself.

In Britain this has been recognized so fully that an official salary is actually paid to the opposition leader. To the anti-democrat that must appear the height of absurdity, and certainly it does seem paradoxical that Englishmen should choose their own government and then pay someone whom they have not chosen to oppose it in every way he can. Yet the arrangement is a perfectly logical result of applying to the operation of government the democratic method, which is the all-important method of discussion.

#### Freedom of Discussion

Freedom of discussion and as much of it as possible in public and in private is the very life-blood of democracy, and nothing is more foolish than to sneer at Parliament, as some people do, as a "talking shop." It is just because Parliament is a place for talk, and often for very good talk, that it is so immensely valuable.

What makes freedom of discussion so vital is that if the accountability of governments is to be a real thing, it is essential that all the arguments for and against what they propose to do should be expressed. There are always arguments both for and against any governmental measure, and even if the arguments on one side or the other are weak, it is still important that they should be expressed since otherwise it cannot be seen how strong the better argument is. Moreover, not only are decisions more likely to be wise when they are arrived at after consideration of all that can be said against them than if they are taken in ignorance of the counter case, but they are also more likely to be accepted willingly by those whom they will affect and so to conduce to the smooth running of the machinery of government.

Freedom of discussion is one example of the freedoms which we sometimes refer to collectively as "civil liberties," liberty of the person, of speech, of the Press, of access to sources of information, and so on, and none of these can exist without the others. They are all causes which



#### SECRET VOTING IN A DEMOCRACY

*Top, voters place a cross on their ballot paper opposite the name of the candidate whom they favour. The paper is folded and placed, unsigned, in the ballot box which is afterwards sealed and taken to a safe place for the count.*



1 THE SOLDIER



2 THE POLITICIAN



"ALL POWER TENDS TO CORRUPT . . ."



5 THE DEMIGOD



6 THE IMMORTAL

#### LIFE CYCLE OF

Mussolini was a soldier in the First World War—quite human. As a socialist politician he rose to power by turning his back on socialist principles. As dictator he needed a



3 RISING TO POWER



4 THE DICTATOR



ABSOLUTE POWER CORRUPTS ABSOLUTELY



7 THE VICTIM



8 A MATTER OF HISTORY

# A DICTATOR

populace trained to Believe, Obey and Fight but not to think. He sees himself as demigod —he sees himself in stone. But deflated, he returns to the soft heat of mere humanity.

democracy is bound by its own principles to uphold or perhaps it would be truer to say that they are the soil out of which democracy grows.

In a speech which he made in August, 1944, Mr. Winston Churchill summed up these liberties in a few questions which might well serve as tests of the sincerity of any regime which claims to be democratic.

'Is there,' he said, 'the right to free expression of opinion and of opposition and criticism of the government of the day? Have the people the right to turn out a government of which they disapprove, and are constitutional means provided by which they can make their will apparent? Are their courts of justice free from violence by the executive, and free of all threats of such violence and all association with any particular political parties? Will these courts administer open and well established laws which are associated in the human mind with the broad principles of decency and justice? Will there be fair play for the poor as well as for the rich, for private persons as well as government officials? Will the rights of the individual, subject to his duties to the state, be maintained and asserted and exalted? Is the ordinary peasant and workman, earning a living by daily toil and striving to bring up a family, free from the fear that some grim police organization under the control of a single party, like the Gestapo started by the Nazi and Fascist parties, will tap him on the shoulder and pack him off without fair or open trial to bondage or ill-treatment?'

#### Rights of Majorities and Minorities

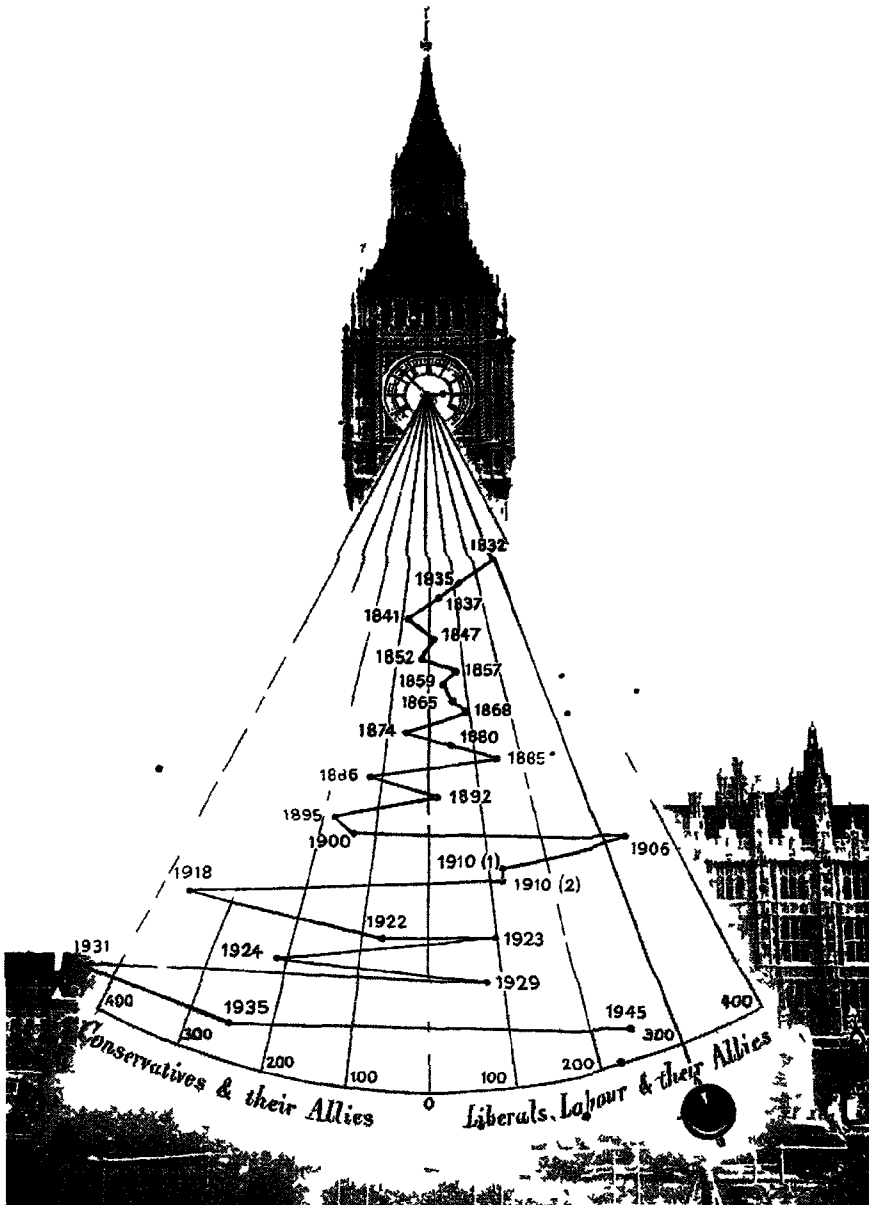
Much of what has been said above has assumed one obvious element in the democratic method of government, namely, that it is a system of majority rule; and perhaps the right of a majority to rule a minority is not self-evident, and we ought to consider how it can be justified. A short and not a bad answer to that question is that since men cannot live together without government of some sort, and since they are not in the least likely all to agree always on the policies that their govern-

ment should follow, the only alternative to the rule of the majority is the rule of a minority, and for that it would be even more difficult to provide a satisfactory defence.

Majority rule, therefore, can be defended without it being necessary for the democrat to pretend to believe that the majority are always wise and right. Certainly they are not, but the reasons why the democrat rejects the idea of entrusting the government to the wisest few, even if these could be identified with any certainty, are the same as those which make him demand that it should be accountable to the whole of the people, and of these we have already spoken. But most democrats would also maintain, though this may be a matter of faith rather than something which they prove, that on the whole the majority are at least as likely, and probably more likely, to be right than the minority. In any case there is no better alternative until all men think alike.

#### When Democracy Fails

All the same it is only on certain conditions that the rule of the majority can be made consistent with democracy, and the states in which these conditions are satisfied are unfortunately the exceptions. In the first place it is difficult for any state in which the majority is not variable but fixed and permanent, to be genuinely democratic. If there is a rift between rich and poor, or between the members of different races, or between the adherents of different religions, a rift which goes so deep that people feel themselves to be not one nation but more than one, then, if the machinery of democracy is set up, it will almost certainly lead to one class or one race or one religion always forming the majority which controls the government. In such a case the essential quality of democracy, that the government should be accountable to the whole people and not only to a section of it, cannot be realized. The façade of democracy may be preserved, but there will be no reality behind it. The rulers will rule because they are more numerous or stronger than the ruled, and not because the right of



### THE PENDULUM SWING OF POLITICS

The diagram shows the result of Parliamentary elections since the Reform Bill of 1832. The approximate extent of the government majority at each election may be seen by glancing at the figures on the curve at the foot.

ruling is accorded to them by the working of a system which all accept because it is fair to all of them. The political pendulum will not swing, and the clock will stop. This, of course, is one of the factors which make it so difficult to envisage a working democracy in countries such as India or Palestine.

There are indeed political devices which, if other conditions are favourable, may bridge the gulf which divides from one another different communities living in the same state. One of these is federalism, which has helped English and French Canadians to work together in a democratic system. But for federation to help, the minority must be localized and that is not always the case. Or again the rift may be too deep to be bridged in that way. All this does not mean that a majority community will necessarily oppress a minority, though it is too often inclined to do so; nor that there cannot be effective constitutional guarantees of minority rights. But it does mean that it is not easy for the government, under which both have to live, to be genuinely democratic.

The existence of a communal division resulting in the permanent constitution of the majority and the minority respectively is only an extreme instance of a wider difficulty. Democracy can only work smoothly when there is a sort of tacit understanding that neither majority nor minority will push things to extremes, that the majority will let the minority have its say, and the minority will not unreasonably obstruct the majority's will. One or both of these things is likely to happen if some fundamental question about the nature of the system is unsettled, or if some fair-sized minority refuses to regard it as settled. That was one of the difficulties



WINSTON CHURCHILL

*More than once in this century has British history refuted the idea that democracy could not produce leaders capable of coping with world-shaking events. Churchill withstood the worst his dictator-enemies could do, and saw them into the abyss.*

in France under the Third Republic. Socially Frenchmen are more democratic than the British are, but they made less of a success of democracy as a system of government than the British have been able to do. In Britain the majority and the minority have always known that they were likely within a measurable time to exchange their roles, and that is a prospect which encourages moderation in both.

After this rapid survey of the meaning of democracy and of some of the conditions which are needed to make it work we may pass on to consider some of the criticisms which the anti-democrat commonly makes against it.

One of the commonest, but also one of the least well-founded of these is that democracy by its very constitution is an

inefficient plan of government. Obviously any government will be inefficient if it places in positions of power men who are themselves incompetent or corrupt, but the suggestion is that incompetence and corruption are more likely to rise to the top in a democracy than they are in other forms of government. Yet if we look at some of the factors which go to make a government efficient or inefficient it does not seem that the record of democracy need fear comparison with autocratic forms of government.

Take, for example, the question of leadership, which is one of the problems which the anti-democrat is inclined to boast that autocracy is better qualified to solve. We have only to compare Franklin Roosevelt or Winston Churchill as leaders with Hitler or Mussolini, to see how ridiculous it would be to assume either that democracy never can, or that autocracy necessarily does, produce great leaders of men. Of course there have been great autocrats but autocrats are not necessarily great. Nor, of course, are all the leaders of democracy great.

But there is one problem of leadership that autocracy can never solve, the problem of succession to power when the autocrat dies or is overthrown. A British General Election or the election of a president in the United States is sometimes accompanied by circumstances which are regrettably sordid, but they are none the less magnificent vindications of the capacity of democracy to solve this essential problem of government. When the General Election of 1945 transferred the power in Britain to new hands, it was so much a matter of course that the change would be accepted without question by all, even by those who very much disliked it, that Englishmen hardly realized what a model of good and stable government they were providing in the midst of a world in chaos.

#### Democracy and Efficiency

Take another element that goes to make up the efficiency of a government, the capacity at need to take decisions promptly. In that respect it is often supposed, even by those who are in general sympathy with

democratic ideals that democracy is by its nature weak. A government which depends on popular support is, it is said, incapable of taking any but short-sighted views, its people will not face unpleasant facts, and they tend to prefer leaders who will follow rather than lead opinion and do not dare to tell the people what they know they do not want to hear. All that is often true of democracy in action, but is it more true of democracy than of other forms of government? Or if it is, is it not more than balanced by even more dangerous defects in autocracy? Hitler and Mussolini were not particularly far-seeing in their estimates of the situations with which they had to deal over and over again their calculations went wrong utterly and disastrously. It may be that they were able to take their decisions promptly without the exasperating delays that a democratic system so often entails, though even on that point the record shows that democracies are not incapable of acting promptly and decisively when they are convinced that it is necessary.

#### The Autocrat's Handicap

But it is even more important that decisions should be right than that they should be prompt. In the last decade we have witnessed the tremendous drama of the wrong decisions of all-powerful autocrats carrying their nations into the abyss. One of the handicaps from which the autocrat suffers is that he cannot be sure that all the information which is relevant to a wise decision is before him, for his own system has closed most of the sources which ought to provide it. He has deprived himself of the lessons to be learnt from public discussion and criticism, and those on whom he depends to keep him informed are tempted to tell him only what they know their master wants to hear, just as the leader of a democracy may be tempted to flatter his master, the people.

But we have been discussing efficiency as though it were an absolute quality, whereas it is always relative to an end in view. If, for instance, one government makes preparation for war its all-engrossing purpose, then, if war breaks out, it is certainly likely to be more efficient for war than one whose



main purpose has been something different. But that will be true whatever kind of government it may be, just as true when it is a democracy, if we can imagine a democracy making war its primary purpose, as when it is an autocracy. The truth is that any comparison between one form of government and another in respect of efficiency is meaningless unless their purposes are the same.

There is, then, little substance in the criticisms which democrats have to meet so far as these are based on the supposed immunity of other forms of government from the defects which are charged against democracy. But the attack is harder to meet when the critic points to the difficulties of translating democratic ideals into practice and to the distance by which all actual governments which profess to be democratic fall short of realizing them.

An American writer, Professor Merriam, has pointed out two dangerous tendencies in modern democracy, neither of which was foreseen either by its friends or by its enemies in the nineteenth century. No one foresaw that if people were given the vote so many of them would not think it worth while to use it, and no one foresaw how easily men might be induced to use their votes to elect representatives, not of the general interest so far as they were able to judge it, but of special interests able in one way or another to deflect their judgments. Such developments are symptoms of that widespread disillusionment with politics in general, which is one of the contrasts between this century and the last. They show what an exacting method of government democracy is. But all that democratic institutions can do, as the Prime Minister of the Netherlands, Dr. Gerbrandy, said during the recent war, is to create the possibility of good government, they can never ensure it.

#### Economic Democracy

This chapter has discussed democracy as a political term, descriptive of a particular manner in which states may be ruled. But it is sometimes claimed today that there ought to be, as well as a political, an economic democracy. Such a claim seems

to involve a certain confusion of thought, for if we are to take the term 'economic democracy' in its natural sense it suggests something which those who make the demand in all probability do not mean.

They do not mean that the workers in a factory, for instance, should form themselves into parties and elect and dismiss the management by majority vote, if they were challenged, they would probably admit that a business, hardly less than an army, can only be carried on by a body of men who are prepared to submit to discipline. That does not mean that the discipline must be autocratically imposed, or that management is under no obligation to take counsel with the workers as to the conditions in which they are to work. It means only that the analogy between a state and a business, which the term economic democracy implies, will not hold, and that improvement in industrial relations must be sought in other ways, in the development, for instance of trade unions and works councils as integral parts of industrial organization.

#### Reason for Discontent

But though economic democracy is a misleading term, the demand for it goes deeper than any question of the proper relation between management and workers, and in itself it is not only a reasonable demand, but one which political democracy will neglect at its peril. It springs from the feeling that the progress of democracy has not done all that men expected it would do to improve the living conditions of the ordinary man. His civil rights may be reasonably secure, his standard of living may have been bettered, and he may have his share in the making and the unmaking of the government which is supposed to have his welfare for its aim. But he often feels that all this does not really make him the master of his own fate, that he is still in the grip of powers which he does not understand and which he has no means of controlling.

No doubt, part of this *malaise* is unreasonable, we know only too well that man never is, but always to be, blest. But it is also due to the feeling that there has been a time-lag between the subjection of politi-

cal power to social ends, which democracy has largely achieved, and the still imperfect subjection of economic power to the same ends

Certainly economic power is more elusive than political and therefore more difficult to control. But there is also a historical explanation. Democratic theory evolved and won its triumphs during a period when *laissez-faire* was the generally accepted philosophy of government, and when in particular the rights of property were regarded as being entitled to a respect which now seems exaggerated. It was not therefore, originally a part of the democratic ideal to subject the holders of economic power to popular control; rather it was intended to secure their rights from the arbitrary interference of the political power. But in so far as democrats were content to limit their aims in this way, they were acquiescing in a state of things in which one form of power over men's lives, that very form which the development of industry and of finance was making ever more and more pervasive, would be left uncontrolled,

the holders of political power were to be made accountable, but the holders of private power were not.

No doubt that is an over-simplified account of the story, democratic ideals were never so purely political as it may seem to imply, nor were the rights of property ever treated as absolute. But it perhaps expresses a feeling that lies behind the demand for the extension of democracy into the economic field, the feeling that to control political power is a shadowy thing unless that power can also be made the instrument for the more effective control of economic power. The crucial question is rather one of pace than of the end in view, for democracy has already made enormous progress in this direction. But one of the dangers which confront it today is that those to whom the pace still seems too slow may be tempted to turn from democracy and to seek other means of subjecting economic power to social ends. The rise and the fall of fascism have pointed a moral both for democrats and for their impatient critics.

### Test Yourself

- 1 Does democracy today mean "Government by the people"?
- 2 What is the essence of the democratic faith?
- 3 Name the exact opposite of democracy
- 4 What contribution do unions, clubs and other associations make to democracy?
- 5 What is the most fundamental of all the objections to despotism?
- 6 Do we use the *representative* form of democracy only because *direct* democracy is impracticable in a modern State?
- 7 Why are political parties essential to democracy?
- 8 Is the rule of the majority necessarily democratic?
- 9 What general answer can be given to the criticisms commonly made against democracy?
- 10 What, if any, meaning can be given to the term "economic democracy"?

*Answers will be found at the end of the book.*



#### CORONATION OF KING GEORGE VI

*Although the real power in the British democracy lies with Parliament, the King is the focus of allegiance and his crowning is a noble and magnificent occasion, when traditions of centuries are upheld with solemnity in Westminster Abbey, founded by Edward the Confessor*

# BRITISH LAW AND GOVERNMENT: THE ORGANIZATION OF POWER

A CONSTITUTION is a design for government, regulating the appointment of the various authorities and prescribing the powers exercisable by them. If the history of a government is merely a record of things happening without any order or principle, or if the order is constantly being broken into by the arbitrary action of persons or groups, we can hardly call it constitutional. Accordingly, some nations have felt that they must lay down clearly in formal documents the main lines—the broad design—on which government is to be conducted.

This has usually happened either when some completely new organization such as the Federal Government of the U.S.A. has been set up, or when changes have been made in existing organizations so radical, as happened at the outset of the French Révolution, that it is felt that the whole scheme of government must be prescribed afresh. In such cases nations have generally, though not always, tried to protect the new structure from hasty change by prescribing a special procedure for amendment. Amendments, for example, may require the consent of something more than a bare majority of the members of the legislature; or they may have to be submitted to some body other than the ordinary legislature, or to a referendum that is to say, to the electorate for approval.

In other words although the organs of government are allowed freedom to act within the prescribed pattern, the alteration of the pattern is conceived of as something different from the ordinary processes of government and the governors are not free to alter it at will.

Now this is not the British view of the matter. The British Constitution is not a prearranged pattern according to which government must be carried on: it does not look back to a single act of conscious

creation. Since the period of the Commonwealth in the seventeenth century there has been no attempt to embody the constitution in documentary form. Further, although single institutions, often of great importance, such as the parliamentary franchise or the Supreme Court of Judicature, have been completely overhauled and now rest upon a statutory foundation, no attempt has ever been made to subject the entire design of government to a systematic revision. Thus although the present constitution differs greatly from the constitution of, say 1800, there is no break in continuity between them, or between the constitution of 1800 and that of 1600 or 1400 or even 1066. Indeed, it would be nearer the truth to speak of England as having been governed not under successive constitutions, but under successive phases of the same constitution, and to that one constitution no definite origin can be assigned.

MOREOVER, just as there is no breach of continuity with the past, so it is not in the logic of the constitution that there should be any breach of continuity with the future, the constitution does not present a barrier or even an obstacle to change. For not only is it not summed up in a single instrument or series of instruments, but there is nothing to prevent any alteration in its various institutions by the ordinary processes of legislation. For Englishmen, no one part of the law is more fundamental than any other or is more immune from change.

Yet it would be absurd to speak of Britain as having no constitution, seeing that she led the way towards modern constitutional government. In spite of the absence of any legal rules restricting change, British government is remarkably stable; the difference between Britain and almost all other countries is that whereas

elsewhere a fixed law of the constitution is supplemented by political traditions and understandings, in Britain the one legal rule which is fundamental, that which is known by the name of Parliamentary sovereignty, emphasizes the possibility of perpetual change, and it is only political principles that give the guarantees of stability without which government cannot be constitutional. Since these political principles cannot be stated in exact terms and are constantly developing to meet new conditions, the constitution can only be described as those legal and political principles which at any given moment regulate the government of the country and secure the liberty of the subject.

#### Parliamentary Sovereignty

The term Parliamentary sovereignty, however, needs explanation. It means that the validity of an Act of Parliament cannot be called in question in any court of law. The courts of the United States can declare an Act of the Congress to be "unconstitutional," that is to say, that in making the Act, Congress has exceeded the powers which the Constitution confers on it, an Act so declared cannot be maintained in law and will not be enforced. Nothing of the sort can happen in Britain. So far as the law is concerned, an Act of Parliament is the highest thing known in the United Kingdom.

This is not to say, however, that the whole of British law is derived from Acts of Parliament, much of it, including much that is oldest and most fundamental to the due ordering of society, is, as we shall see in a later chapter, common law or equity, that is to say, law which has developed from past interpretations and judgments given in the courts of law and accepted as "precedents" or valid guidance for future judgments. But neither common law nor equity can overrule the laws enacted by Parliament, which we call statutes. Statutes retain their force so long as they are not altered or superseded by other statutes, and among them there is only one kind of superiority: a later statute can repeal any earlier statute and supersede any earlier statutory provisions inconsistent with it.

In a law-abiding community, such as the British community is acknowledged to be in an exceptional degree, the mere fact that Parliament has made a statute raises a strong presumption that it will be obeyed. The ordinary citizen will not readily set up his own private judgment against that of Parliament. But there are limits to obedience, and in a country like the United Kingdom, where public opinion is strong and knows how to make itself felt, the supreme legislature must always take care to keep within them. Hence, though there are no legal limitations in the sovereignty of Parliament, the political limitations are very real.

Parliament has certainly done some very odd things, but the Acts which are rightly pointed to as the most decisive proofs of its legislative sovereignty, Acts fixing the limits of its own duration, also show quite clearly the limits within which alone it can be exercised.

In early times there was no limit to the possible duration of a Parliament, when a king thought it necessary or advisable to consult the nation he summoned a Parliament, and a fresh House of Commons was elected on each occasion. Sometimes he found it convenient to keep a House which had proved accommodating and "prorogued" it instead of dissolving it. In other words, when he again required the presence of the nation's representatives, he summoned the old Parliament to reassemble without a new election. There was no limit to the number of times this could be done.

The principle of indefinite duration at the will of the King prevailed until 1694 when William III assented to the Triennial Act which provided that no Parliament should last longer than three years. The Act remained in force until the passing of the Septennial Act, 1716, which enacted not only that all future Parliaments, but also the very Parliament that passed it, should last for seven years unless previously dissolved by the King.

The Septennial Act has always been cited as conclusive evidence for the sovereignty of Parliament and rightly, for it was a frank exercise of power by the Whigs, who dreaded the possible effects of an imme-



CORONATION BANQUET IN 1821

*George IV's coronation banquet is here seen through the eyes of a contemporary illustrator. Dignity and ceremony are fittingly presented in the austere setting of Westminster Hall*

mediate dissolution. Yet the fact that it remained in force until the present century seems to show that there was much to be said for it as a long-term measure.

The reduction of the duration of Parliament in 1911 to five years was less significant, it marked not so much the independence of Parliament as its dependence on the electorate and it was also part of a general

must not secure another extension without the consent of the Labour minority, and when Churchill asked his Labour colleagues to remain in the Government without a general election until the end of the Japanese War, he felt bound to couple his request with a suggestion that the electorate should be asked to signify its approval of the postponement by a referendum. In



QUEEN VICTORIA'S CORONATION

*From a contemporary print of the coronation procession in 1838 of Queen Victoria. Her reign of sixty-three years saw great material and social developments, with England becoming the leading world power. Observe that Trafalgar Square lacks the familiar fountain and lions and Nelson's column has not yet appeared.*

scheme of reform which had been submitted to the electorate for its approval. Nor ought much to be made of the circumstance that the very Parliament that introduced the change extended its own life by successive statutes until it had sat for almost eight years, for the extensions were made in time of war with the express approval of all the political parties represented in Parliament and the tacit consent of the nation. What is more important is that in 1945, after the precedent of the First World War had been followed for almost five years, it was universally recognized that the Conservative majority in Parliament

other words, all the recent changes, permanent or temporary, in the maximum duration of Parliament have thrown into relief not so much the legal sovereignty of Parliament, which was not indeed in doubt but the existence of political limits to its exercise.

#### King, Lords and Commons

Older generations used to describe the United Kingdom as a limited monarchy and contrasted it, on the one hand, with absolute monarchies, in which the monarch could do as he liked, and, on the other, with republics founded on a basis of political

equality and popular elections. Parliament, the supreme legislature, by whose authority alone changes could be made in the law, was more properly called the King in Parliament, and comprised, beside the King, a predominantly hereditary House of Lords and an elected House of Commons.

Thus Parliament had what was called a mixed constitution: it contained monarchical, aristocratic and popular elements, and since all had to agree to a proposal before it became law, there were, it seemed, real safeguards against hasty or tyrannical legislation.

But do the supposed checks and balances really exist and, if so, are they permanent or merely temporary and capable of being destroyed by one of the partners? To answer these questions we must examine more closely the composition of Parliament.

Not only is the King a necessary part of Parliament, but the very title to the Crown rests on the Act of Settlement, passed by Parliament in 1701, which provides that the Crown shall be hereditary in the line of the Electress Sophia of Hanover, so long

as it remains Protestant. Indeed, the title of His present Majesty depends on the Abdication Act, 1936, which, after giving effect to the abdication of Edward VIII, continues "and accordingly the member of the Royal Family then next in succession to the Throne shall succeed thereto and to all the rights, privileges, and dignities thereunto belonging." Thus the title to the Crown is a parliamentary title, although its hereditary character has been maintained by Parliament. The present strength of the monarchy as an institution is due, not to anything in the law, but to its popularity and usefulness.

The House of Lords is partly hereditary, partly filled by appointment. The non-hereditary members comprise the Lords Spiritual, namely, the Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester, and the twenty-one seniors in office of the other bishops of the Church of England, together with the nine Lords of Appeal in Ordinary, who are judges appointed to hear appeals in the House of Lords. There may also be one or two ex-Lords of Appeal, for

GROWTH OF REAL DEMOCRACY		
Reform Acts	New Voters	Total on Register
1832	500,000 middle-class men	1,000,000, one in 24 of population
1867	1,000,000 mainly town working-class men	2,500,000, one in 12 of population
1884	2,000,000 agricultural labourers, etc	5,000,000, one in 7 of population
1918	13,000,000, women either married or 30 years of age and over, all men over 21	21,000,000, one in 2 of population
1928	5,000,000 women of 21 years of age and over on equal terms with men	28,500,000, one in about 16 of population

*Democracy becomes a reality in proportion as the populace have the right to elect freely their representatives to Parliament. So long as this right was restricted to men of property Parliament tended to be the Parliament of the propertied classes. The table above shows how, during the last century, successive Reform Acts have extended the franchise to ever greater numbers of people until now every adult man and woman of twenty-one years of age and over has the right to vote in Parliamentary elections.*





#### HOUSE OF LORDS IN THE NINETEENTH CENTURY

*This photograph of a century-old print shows a scene of ceremonial splendour in the House of Lords the occasion being the presentation of a loyal address to King William IV. The peers wear their state robes, plumed peeresses fill the galleries.*

they do not lose their seats in the House on retirement from judicial office. These Lords of Appeal sit in the House in virtue of an Act of Parliament, for it has been decided that, without such authority, although the King may create a life peerage, its holder cannot sit in the House of Lords.

The vast majority of the Lords hold hereditary peerages, as dukes, marquesses, earls, viscounts or barons. Originally, the King was entitled to summon anyone he wished, though he would normally confine his choice to the great men of the realm. But for many centuries it has been the rule that if a person has been summoned to the Upper House and has actually taken his seat, his successors in title are entitled to sit. However, although the King cannot deprive anyone of his seat, he can always modify the composition of the House by making new peers. It is usual to create anything from two to half a dozen new

peerages a year, and rather more on a dissolution of Parliament or the advent of a new Government, and there is always in reserve the power to "swamp the House," that is, to alter its political complexion by a wholesale creation of peers. Thus the House of Lords is ultimately dependent on the Crown and has never been able to defend its own existence.

#### Composition of the Commons

The House of Commons has always been a purely elective body, but both the electorate and the constituencies have varied greatly in the course of centuries. Before the great Reform Act of 1832 each English county sent two "knights of the shire" to Westminster, elected by the holders of freehold land of an annual value of forty shillings in the county. But most of the English members represented boroughs, of which some had never been large or important enough to merit repre-

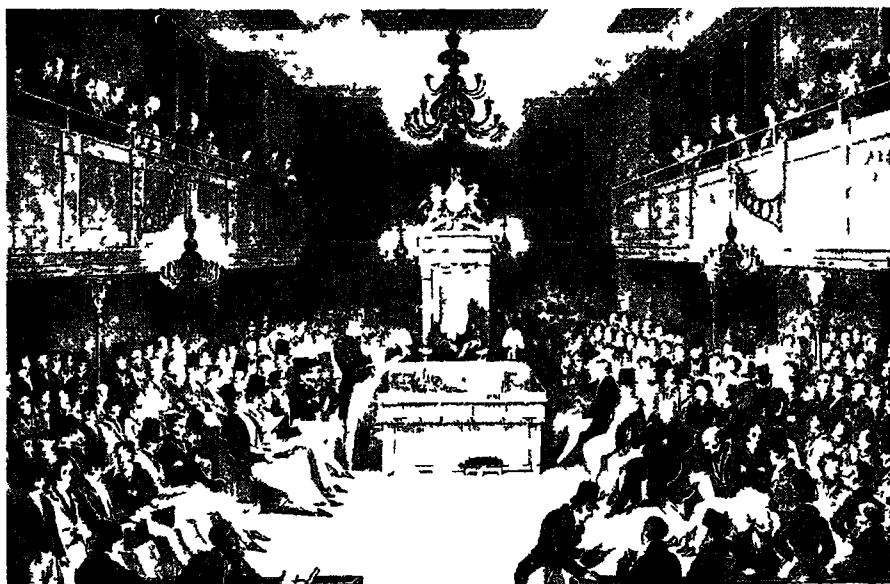
sentation and others had declined to the same negligible status whereas many of the towns which had become great through industry or trade were unrepresented. The borough franchise varied from borough to borough, but in a wholly disproportionate number it was so restricted that the members had come to be nominated by a few great men. It would be unfair to say that the electoral system before 1832 produced a bad House of Commons, in fact, towards the end it gave the country several Houses of great distinction and ability. But it was representative only of the landowning class, with a small infusion of lawyers and merchants, and since it was largely under the control of members of the House of Lords, conflicts between the two Houses were unlikely to occur.

#### Reforms of the Franchise

Successive reforms extending from 1832 to 1928, have transferred electoral power, first to the more substantial middle class

then to the lower middle class and the workmen in the towns, then to the mass of male householders, then to adult males over twenty-one years of age and most women over thirty, and finally to almost every person over twenty one of either sex.

The present franchise can be stated quite simply: a person is entitled to be registered as an elector in a constituency if he or she is at least twenty-one years old and not subject to any legal incapacity, is not, for instance, an alien, a peer, a lunatic or a felon, and has a residence qualification. Another qualification was that of business premises, for this qualification a person had to occupy business premises worth £10 a year or upwards, but had to make a special claim to be registered under this qualification. University graduates were entitled to be registered as electors in their respective university constituencies, of which there were seven, returning twelve members. These rules made it possible for some persons to be registered in more than



THE FLOOR OF THE OLD HOUSE OF COMMONS

*A scene showing the old House of Commons, with Parliament in session, shortly before the fire of 1834 which destroyed it. Formerly St. Stephen's Chapel, the Commons used it as their meeting place from the year 1547. The reproduction is from a contemporary drawing.*

one constituency, and were no restrictions placed on their right to vote, some of them might have been entitled to cast a large number of votes in different constituencies. This was prevented by the rule that a person might vote at most twice at a general election: once in respect of a residence qualification and once in respect of any other qualification. Thus the system was one of virtually universal adult suffrage slightly weighted in favour of business and the professions at the expense of other classes.

In some of the university constituencies the election was governed by the system known as proportional representation, which allowed minority parties or independent voters to pull their full weight.

Except for a few two-member constituencies, each division elects a single member by a bare majority. The effect is to weaken, and usually to stifle, small parties, unless they are strong in particular localities, as the Liberals still are in rural Wales, and to give additional strength to the strongest party. Since the present arrangements tend to ensure the existence of a two-party system,\* they seem preferable to others which, while securing a fairer representation of different points of view, would probably lead to a multiplicity of parties and an instability of governments.

#### More Power to Electorate

Now the Great Reform Bill of 1832, though it only started the process by which the House of Commons became truly representative of the nation, completely shifted the balance of power in the constitution and made other changes inevitable in the long run. The House of Commons could no longer be managed in the old way by aristocratic boroughmongers. Henceforth it would be managed by party leaders with their eyes on the next election, for in spite of persistent family influence in many parts the electorate was now fully awake. Sir Robert Peel saw at once that a party of mere resistance had no future before it, the Tories must transform themselves into a Conservative Party, offering an alternative programme to the electorate. Since that time, in contrast to most non-English-

speaking nations, we have had no substantial body of reactionaries and virtually no irreconcilables. Set beside this fundamental change, all subsequent changes in party alignments are of secondary importance, for without it the constitution as we know it could not be worked at all.

Secondly, the Lords, being no longer able to see that their interests were protected in the House of Commons, became more active as a House, on the other hand their wisest leaders realized that while they could make things difficult for hostile governments, they must never appear to thwart the will of the electorate. They were in fact, thrown into the arms of the Conservative Party, the leaders of which for over half a century insisted that they must do nothing to make the party unpopular in the eyes of the nation.

#### Commons and Crown

It also became apparent that the King's choice of ministers amounted to very little. For the King could not influence the new electorate as he had influenced the old. In 1835, for the first time since the reign of William III, a government enjoying the royal favour was defeated at a general election and had to resign. Previously, changes of government had taken place owing to a withdrawal of support by the King or, more rarely, the House of Commons, and had been ratified by the succeeding general election. The election of 1835 made two things clear: namely, that it was no longer safe for a King to withdraw his confidence from ministers who retained the confidence of the House of Commons, and that he must accept the verdict of the electorate given at a general election. For the time being the House of Commons succeeded the King as maker and unmaker of governments, until the meaning of general elections became so clear that even the House had very little real independence. But the King, though he might wield great influence, steadily lost power, until now it may be said that unless a crisis should happen of a kind which we have not known since the clamour for the Reform Bill in 1832, his actual power has entirely disappeared. Although in form he

still acts on the advice of ministers, he is now really the most dignified, and one of the most important of those who advise the government. So little political power does he retain that if the Prime Minister formally tenders advice he must act on it.

A Prime Minister will not lightly and without being sure that he has the support of the electorate ask the King to create enough new peers to swamp the House of Lords, but if he does, the King must grant his request. Accordingly at any time after 1832, if there was a "show-down" between Lords and Commons, it was certain that the Commons must win.

For various reasons the test did not come until the great Liberal Governments of 1905-15. Although the Upper House had had a permanent Conservative majority since 1832, the Conservative leaders had shown the utmost political adroitness, resisting Liberal measures only when they felt sure of the support of the electorate; and for most of the time from 1885 onwards, when the electoral franchise was made truly democratic, they were in power. In 1909 however, the Lords threw out the Lloyd George budget and challenged the Liberal majority in the Commons to a decisive contest.

They were on difficult ground, for they had for a long time tacitly dropped their claim to amend, and even to reject, bills for the raising or spending of public money. They had, it is true, always protested against the practice of "tacking" non-financial proposals to money bills and had claimed the right to exclude such proposals, and they maintained that the Lloyd George budget, though financial in form, contained new duties which were intended as the initial measures in a programme of social reform, on which they were entitled to have their say. However, their rejection of the budget was in effect a claim to hold the Government responsible, in extreme cases, to themselves as well as to the Commons, and two general elections held in January and December, 1910, showed that the country was against them.

The Parliament Act, 1911, regularized the resulting situation, and stabilized the position until the problem was again

revised by the Labour Government returned in 1945. It provided in effect that money bills should not be subject to the veto of the House of Lords, but a money bill was narrowly defined so as to prevent tacking, and the Speaker of the House of Commons might not certify a bill to be a money bill unless it contained nothing but financial provisions in the strict sense of the term.

In respect of all other public bills, the veto of the House of Lords was reduced to a two years' suspensive veto—that is to say, if the House of Commons passed a bill three times in three successive sessions and the House of Lords (having received it at least one month before the end of the session) rejected it on each occasion the bill might be submitted for the royal assent, provided two years had elapsed between the second reading of the Bill on the first occasion and the Commons' final passing.

Finally, the maximum duration of Parliament was reduced from seven to five years, and any bill containing any provision to extend the maximum duration of Parliament beyond five years was still subject to the absolute veto of the House of Lords. On the other hand, a bill to reduce further the powers of the House of Lords or to remodel or even abolish it, would be subject only to the two years' suspensive veto.

#### Party Organizations

The House of Commons has been able to assert its superiority over the other parts of Parliament because in an age which has committed itself to democratic principles only a body representing the electorate can claim to exercise power, and the House of Commons is the only body elected to represent the whole of the United Kingdom. But the only way in which the electorate can make certain of giving a reasonably clear decision at a general election is to accept party organizations, and, if possible, no more than two of them. Electors then tend to vote for a particular candidate not so much because they are impressed by his personality as because he is put forward by a particular party. This is not to say that personalities do not count, but the important personalities are those of the

leader or leaders of the party as a whole, and even if they are strongly marked and exercise a powerful influence on the electorate, the past record or declared policy of the party may be even more important.

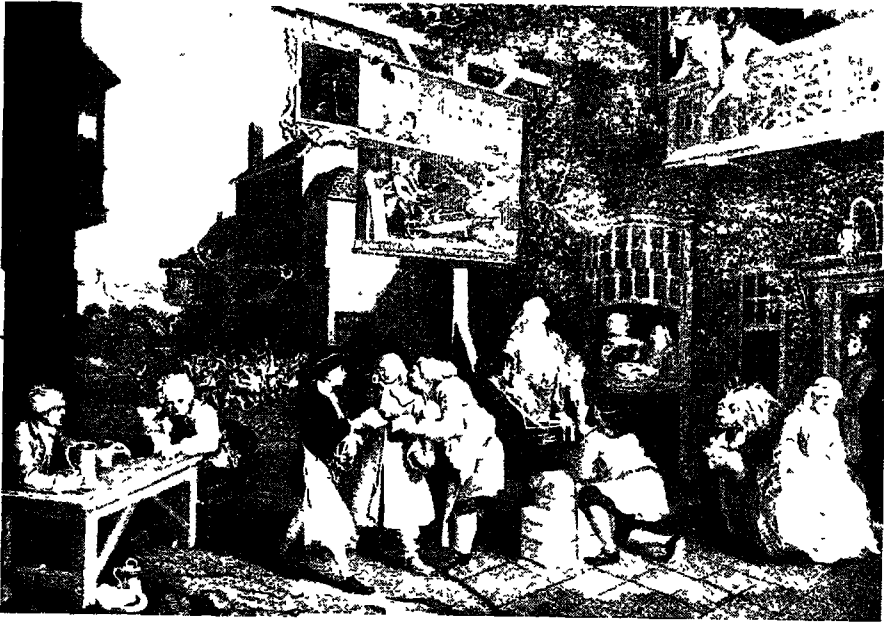
Accordingly when a successful candidate enters the House of Commons he is expected to vote with his party. A certain latitude is allowed especially when the interests of his constituency are in question, but not much. Party discipline has to be strict, because the continued existence of a government depends on its being able to call upon the House to pass measures necessary to its policy, and an ill-disciplined Opposition is not likely in its turn to carry a general election.

The preservation of discipline is greatly assisted by the power of dissolution, for the Prime Minister can, if necessary, remind refractory supporters of his right to ask the King to dissolve Parliament, and since public opinion is apt to swing from election to election for candidates with insecure seats dissolution may mean exclusion from Parliament, while for those with safe seats, who are commonly the most extreme members of the party, it may possibly mean the success of the opposite party. Indeed, this latter consideration weighs with all supporters of a government, since they are always faced with the argument that though they may not like a measure proposed by their own leaders, they dislike the general policy of the opposition more. Thus, if the rank and file of a party dislike measures which they know or fear that their leaders are about to propose, they are likely to express their feelings privately outside the House and try to convert their leaders to their own views. The Labour Party has a special organization devised for the purpose of keeping the leaders in touch with the party as a whole. But experience seems to show that a party has little chance of success unless it accepts the leadership of a single person or a small group of persons, and in the United Kingdom this means if the party is in power, the Prime Minister or the Cabinet, and, if it is not, the Leader of the Opposition and his chief colleagues, or Shadow Cabinet, as it is often called.

That the leaders of the party in power should be those entrusted with the government of the country or, as they are often called, the Executive, is to be explained mainly on historical grounds. Except for a short time during the Civil War and Commonwealth period in the seventeenth century, Parliament has never claimed to govern the country. The King has always governed through his ministers, for government is a continuous process, and Parliament met only intermittently and in early times at long intervals. But since government cannot be carried on without money, the Government and the House had to be brought into some sort of relationship with each other. At no time has the law been used for this purpose; we shall see that, so far as the law goes, King and Parliament are at arm's length. The necessary connexion has been made by political understandings, which, since the latter part of the nineteenth century have come to be named "conventions of the constitution."

#### Conventions

All constitutions have such conventions, though the more recent the constitution, the more accurately and completely is the actual working of government likely to be expressed in terms of law. Law has always a certain rigidity against which politics rebel. It is better that some relations between the various parts of government should be left fluid, so that they may adjust themselves to changing circumstances. Thus the rule that Parliament must meet every year is not a rule of law but a convention. However, this is due merely to historical accident, and the rule is so definite that it could easily be expressed in statutory form. A change of this kind was, in fact, made by the Statute of Westminster, 1931, the effect of which was to turn into rules of law conventions on which the relations between the Parliament at Westminster and the Parliaments of the Dominions had up to that date depended. On the other hand, the cardinal rule of the modern constitution, that a government which has lost the confidence of the House of Commons must either advise the King to dissolve Parliament or



#### HOGARTH SATIRIZES POLITICS IN THE EIGHTEENTH CENTURY

*Bribes rather than arguments were the currency of election canvassers (above), and chasing the successful candidate (below) combined the delights of a carnival and a battle.*



resign, not only has not been, but hardly could be expressed in terms of law, for questions of confidence are not legal, but political.

The great constitutional lawyer Dicey who was the first to subject conventions to a close analysis, came to the opinion that although they were not law they had the law for their ultimate sanction. For some of them at least he proved conclusively that if the Government broke them, either the King's service could not be carried on or some servant of the Crown would be placed in a position where he had to break the law. Thus, if Parliament were not summoned in any year, or if a government persisted in carrying on for a long time in defiance of the will of the House of Commons, in the one case the House could not, and in the other it would not, impose sufficient taxation or grant sufficient money to enable government to be carried on, in either case government would break down at some essential point or else someone would have to take some person's property by way of taxation or spend money illegally. However, it is now generally agreed that these legal sanctions are not present to the mind of the politicians who work the constitution, and there are other conventions, such as the one that makes all members of the Government collectively responsible to the House of Commons for the acts of any one of them, which have no legal sanction at all.

The conventions are, in fact, political understandings, and the sanction behind them is also political. They are observed because, so far as politicians can see, they provide the best means of making the legal constitution work, and if better means could be devised, they would give way to other conventions.

#### Evolution of the Cabinet

The actual government has always been carried on by certain great officers of state, such as the Lord Chancellor or the Secretaries of State, and at first such co-ordination as was necessary was done by the Privy Council, that is to say, the King himself in the presence of a number of his confidential advisers to whom the great

officers belonged. In the later seventeenth century, in order to secure secrecy the King began to hold smaller or Cabinet Councils, to which none but the great officers were summoned, and shortly afterwards two other developments went on concurrently: the governing class of peers and superior gentry who sat in Parliament found it necessary to undertake the great offices themselves if they were to control policy and administration and not allow the King to act behind their backs; and the King found that his relations with the House of Commons became smoother if he made up his Cabinet exclusively from the party or collection of groups that controlled a majority of the House. But a natural consequence was that the King tried, with some success, to secure a majority by granting minor offices and pensions to members who were willing to vote for him.

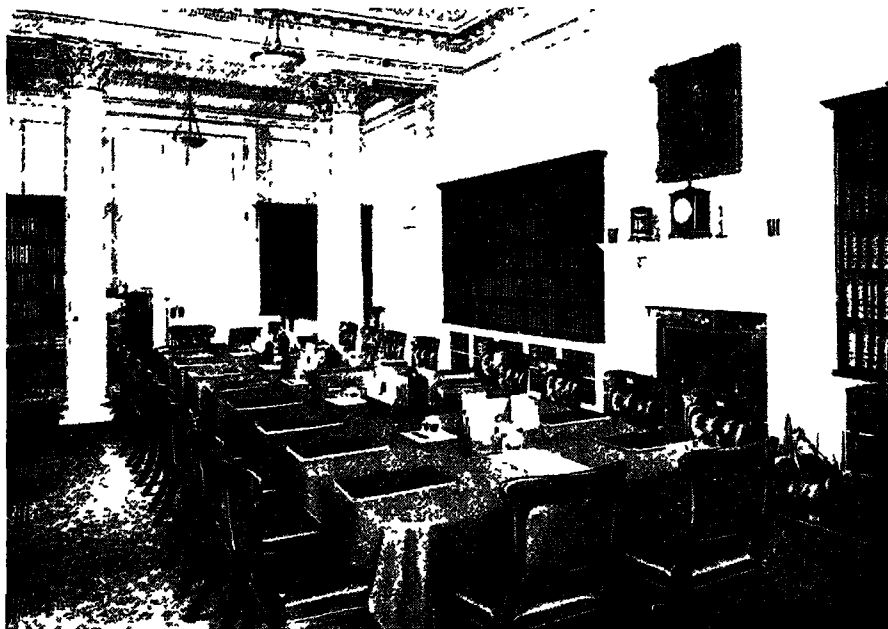
Towards the end of William III's reign, a revolt of the House of Commons threatened to reverse the course which had hitherto been maintained. In 1701 the Act of Settlement, which provided that at the death of Anne, the Hanoverians should succeed to the throne, also enacted

- (1) that from that date no person holding an office or pension from the Crown should sit in the House of Commons,
- (2) that all matters properly cognizable by the Privy Council should be decided there,
- (3) that all Privy Councillors agreeing to the decision should append their signatures.

But five years later the second of these provisions was repealed and the first was amended so as to exclude only holders of "new" offices created after the passing of the Act.

Thus, although the power of the Crown to manage the House by corrupt means was drastically curtailed (not by any means abolished for another century), ministers were left free to become members and lead the House, and the evolution of our modern Cabinet system was thereby made possible.

The accession of George I hastened the



• CABINET ROOM, 10 DOWNING STREET

*Cabinet government grew out of the secret inner committee meetings of the Privy Council, and took its present form in the eighteenth century. The size of the Cabinet was increased with the developments of modern government and the creation of many new ministerial departments; but recently it has tended to diminish, and its numbers stand at about seventeen.*

processes already at work. Since he could not speak English and was not interested in internal administration or politics, he soon ceased to attend Cabinet meetings. Thus the party leaders were left to discuss the main questions by themselves and merely to report their decisions to the King, who in course of time found that he had either to accept their decisions or to change his ministers. Further, one minister now had to preside, and the King came to ask a "prime minister" whom he particularly trusted, and who had the confidence of the House of Commons, to choose his colleagues, or, as we say, "to form a government." Thus the Cabinet acquired a corporate unity which it could preserve against King and House alike.

But the process took long to complete. Although Walpole, who held office from 1721 to 1742, is usually called the first Prime Minister, neither the name nor the

thing was popular, and the modern system dates at the earliest from the career of the Younger Pitt at the end of the century. By his time it was clear that only a person of great administrative ability and the undisputed leader of a party commanding a majority in the House of Commons could be a satisfactory head of the Government, and the events of the succeeding period down to the great Reform Act only reinforced the lesson that the Government worked best when it was controlled by a Cabinet agreed on fundamentals and under a strong Prime Minister. Amid all the great changes that have since taken place the habits of a hundred and fifty years have persisted although party control of the House of Commons is essential to a Government, it is still the Government and not Parliament that actually governs, and the leaders of the predominant party in Parliament control the Government, not from





#### PARLIAMENT NEARLY TWO AND A HALF CENTURIES AGO

*Hogarth's famous painting shows (left) the first Prime Minister, Sir Robert Walpole who served under George I and II. Pointing at him is the Speaker of the House in his robes of office, the Clerk seated, is preparing to take down an official record*

the outside, but by themselves assuming the chief administrative posts

Until quite recently neither the Cabinet nor the office of Prime Minister was known to the law, and even at the present day the only important legal provisions relating to them are those which provide that the Prime Minister shall be paid a salary of £10,000 a year as first Lord of the Treasury, and each Cabinet Minister £5,000 a year irrespective of the office he holds. But these provisions do not confer any powers on them any more than that which allots a salary of £2,000 a year to the Leader of the Opposition. Indeed, the Prime Minister and the Cabinet have no legal powers as such: their task is to determine how those persons and organs which have powers shall exercise them, and their relations with the House of Commons are determined by conventions, the most important of which is that they must either advise a dissolution or resign if they lose the confidence of the House. Similarly, it is only convention that regulates the relations of the Prime Minister with, on the one hand, the King and, on the other, the Cabinet.

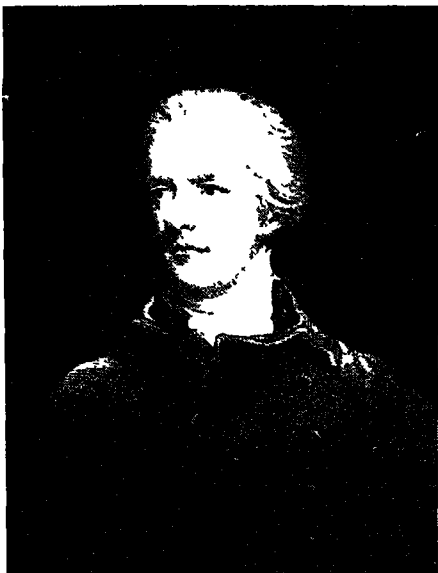
#### Ministers and the Crown

All ministers are servants of the Crown and are appointed by the King. This is not a fiction: the King does appoint them, even though he has little or no freedom of choice. He calls upon one person, as Prime Minister, to form a government. The Prime Minister then distributes the various offices of state among his principal supporters and advises the King to appoint them, at the same time designating some twenty of them to serve with him in the Cabinet. Convention gives him, and him alone, the right of choosing his colleagues and of deciding which particular offices they shall hold. Convention also compels the King to ratify his choice, for even if he objects, if the Prime Minister overrules the objection, he must submit. Convention also gives the Prime Minister the right to call for the resignation of any of his colleagues, and, apparently, without consulting the Cabinet, to advise a dissolution of Parliament or to resign office, his own

resignation normally carrying with it the resignation of the whole administration. Finally, convention compels the King, in all but one or two doubtful cases, to accept and act upon advice formally tendered to him by the Prime Minister.

The King is by convention bound to govern through ministers who have the confidence of the House of Commons. He may choose as Prime Minister anyone who, in his opinion, can manage the House, but generally his choice is limited by the realities of the political situation. If one party has a clear majority and a recognized leader, the King must choose him. He is never likely to have any option if the Labour Party has a majority, for that party always elects its leader from time to time. Even among Conservatives or Liberals, when either party has had a clear majority, the King has had a relatively free choice only on the rare occasions when the Prime Minister has either resigned or died and there has been no question of inviting another party to undertake the Government. Thus on Gladstone's retirement in 1894, Queen Victoria appointed Lord Rosebery, and in 1923, on Mr. Bonar Law's resignation, King George V chose Mr. Baldwin. But though in neither case was the choice inevitable, it was acceptable to the party. If no one party has a majority, the King has greater freedom, but even in this case he must try to obtain a Government which has a reasonable prospect of staying in power for a considerable time, and though he may do much to resolve a difficult situation, he is essentially a mediator and is ultimately at the mercy of the party leaders and the House of Commons.

The Prime Minister too, is very much circumscribed in his choice of colleagues: for unless he is prepared to see the formation of a group of potential rebels within his party, he must find places for all the most important members of his party who desire office. But whatever obstacles a Prime Minister may encounter when forming a Government, once he has got it into working order he tends, if he is a man of any strength, to rise above his colleagues. Moreover, so long as the Cabinet contains the most important or, what is not quite



#### PRIME MINISTER AT TWENTY-FOUR

*To his seniors little more than a schoolboy, William Pitt at twenty-three reorganized the country's finances, and at twenty-four started his great career as Premier.*

the same thing, the ablest members of the party, he is likely to retain leadership.

Nevertheless there have long been symptoms of a change. In the eighteenth century the parties were really aristocratic connexions which, while they used able men of lower social standing such as Burke, kept leadership in the highest ranks of society. Until the loss of the American Colonies was finally acknowledged intrigue counted for more than anything else. The Younger Pitt introduced a change. Not only did he make party politics turn much more on issues of policy than at any time since the death of Anne, but he emphasized the importance of sound administration, especially in finance, and as time went on he gathered around him men of the governing class who were willing to go to school with him and become men of business as well as politicians; "Mr. Pitt's young men" started a succession which has not yet come to an end. It would hardly be too much to say, for instance, that Pitt trained and appointed

Lord Liverpool, Liverpool Peel, Peel Gladstone, Gladstone Asquith, and Asquith Churchill.

Most Prime Ministers are constantly on the look-out for able young men to carry on the leadership of their party, and as time goes on they pick them from ever widening circles.

Since the great Reform Act, men have forced their way into high politics from below, at first mainly radical business men from the manufacturing towns. So long as the electorate remained restricted to the upper class and the higher reaches of the middle class, they were hardly ever appointed to office, but after the franchise had been made democratic they gradually ousted the aristocratic Whigs from their control of the Liberal Party.

About the same time the parties began to build up powerful organizations on a local and national basis, and much more representative in character than had



#### LLOYD GEORGE

*After introducing great social reforms Lloyd George became Prime Minister during the 1914-18 war, his planning and inspired leadership brought victory.*

hitherto been the case. During the eighties and the early nineties they administered a number of shocks to the party leaders, and for a time the National Liberal Federation actually forced Radical measures on the Liberal leaders in Parliament and secured great reforms, especially in the franchise. But this was largely the work of Joseph Chamberlain, a political genius. After his defection from the party, when Gladstone espoused the cause of Irish Home Rule, the Federation gradually lost its influence, and its constitution was altered so as to bring it substantially under the control of the leaders in Parliament. The somewhat similar National Union of Conservative and Constitutional Associations had likewise in the eighties been captured by a political rebel of great popularity and ability, Lord Randolph Churchill, but his rashness played into the hands of the Prime Minister, Lord Salisbury, and he faded out of high politics; whereupon the National Union was brought under the control of the Conservative Central Office.

In the two traditional parties, therefore,



WILLIAM EWART GLADSTONE

*For sixty years of Parliamentary life Gladstone upheld the standard of Liberalism with dignity and moral weight*



BENJAMIN DISRAELI

*Gladstone's Conservative rival, Disraeli, was the founder of the Imperialist movement. Both "Dizzy" and Gladstone are here caricatured by "Spy".*

the game was played out, and the task of keeping them in tune with popular aspirations was left to the political instinct of the leaders in Parliament, the great national organizations being useful mainly for electioneering and to some extent for notifying the leaders of incipient trends of opinion. The choice of Parliamentary candidates was indeed left to the local associations, guided occasionally by suggestions from the Central Office, but these tended to harden into oligarchies of landowners or business men who for preference nominated men of wealth.

Both parties were in danger of losing touch with labour. In the end this was more disastrous to the Liberals, for though the Conservatives failed to nurture the seeds of Tory Democracy planted by Disraeli and Lord Randolph Churchill and became associated with attacks on the Trade Union movement, they retained solid support among the vast body of Conservative working men, and at the same time came to be the recognized defenders of property in whatever form. For the Liberals, on the



#### HOW A PARTY ADOPTS ITS

*The photograph shows a local selection committee of a political party listening to candidates who desire to stand for Parliament. An aspirant to Parliament tries to convince his hearers.*

other hand, it was a matter of life and death not only to carry measures demanded by the more advanced portion of the working class, but also to bring a sufficient number of them into the House of Commons. The former they did in great measure before they had the ill luck to split in 1916, the latter they were never able to do to more than a very small extent except in the mining constituencies. Thus the Labour Party came into existence and eventually supplanted them as the great party of progress.

The Labour Party came entirely from below. Moreover, it was a new party and, unlike the Radicals, did not try to capture either of the existing party organizations. Thus it had to make its own leaders outside Parliament and then proceed to get them seats. It is not therefore surprising that the Labour Party has always been organized on a democratic basis, that it lays great stress on the importance of deciding everything by a majority vote, and that the organization in the country has never been under the thumb of the leaders in Parliament; but is a genuine federation of local

party organizations and trade unions. There is no leader in the sense that the Conservative Party has a leader. The party organization elects a new chairman every year. The Parliamentary Labour Party, which comprises Labour members of both Houses, likewise elects a leader once a year, but usually re-elects last year's leader.

It is too early to see how this organization will work, but it may be suggested that it will work well if the large number of politicians who run the party as a whole recognize that having elected their leaders they must trust them and give them sufficient discretion to deal with emergencies and with matters of policy which must be kept secret, and recognize that, like the Younger Pitt, they must bring forward young men of administrative ability and give them the necessary experience of administration and high politics while they are still able to learn. In two directions the Labour Party is stronger than the other parties: (1) it depends greatly on trade-union leaders, who have had immense experience in negotiation and in administration of a popular kind; and (2) a very



#### PARLIAMENTARY CANDIDATE

*that he is the man to represent their party's aims and policy in that constituency. In every constituency the different party organizations choose their candidates in some such way*

large number of its members of Parliament have local government experience. But neither is a complete substitute for long experience in high politics or for the kind of administration which is done by a great government department.

In organization the party is still primitive compared with the great American parties, and it can hardly be said to possess a "machine" in the American sense of the term. So long as it remains a "cause" for which people are prepared to sacrifice themselves rather than an instrument for getting themselves jobs, it is well fitted for its purpose. But it is unlikely that the selection of candidates and the formation of a party programme can ever be done by purely democratic means, at any rate in a populous and highly industrialized country; for the great number of people who are not willing or able to give much of their time to politics will always leave them to the few who are, and there is a danger that the latter will be more interested in power than anything else. American experience seems to show that the more democratic the form of party organization, the more it

plays into the hands of the machine. The moral seems to be that if one must have a machine one must see that one gets the best people into it, and on the whole the best people will be those who actually tackle the most important problems in the most public place, that is to say, ministers who sit in Parliament.

Be this as it may, the discipline of the Parliamentary Labour Party is extraordinarily strict, and a Labour Government should normally have no difficulty in enforcing its will on the House of Commons.

There are, however, checks which limit the powers of any Cabinet. The first is that the House of Commons can last for only five years at the most, and, in fact, the political situation usually makes a dissolution desirable early in the fifth year at the latest. Therefore any Government must always be thinking of its prospects at the next election.

Moreover there is always an opposition party ready to take advantage of its mistakes; and although a modern opposition is not allowed, nor would it desire, as free a hand to obstruct government business

as formerly, all parties in the House of Commons are fully convinced that it has an inalienable right to criticize the Government and to try to supplant it by constitutional means, that is, to win the next general election. Indeed, it has been well said that given free elections, an opposition that is not allowed to oppose in Parliament is by that fact supplied with arguments for opposition in the country. If it can be asserted that the Government fears criticism, it can be suggested with considerable force that there is ground for criticism.

Secondly during the last sixty years a doctrine has grown up which is known as the doctrine of the mandate. In a general election, party leaders make definite promises both positive and negative,\* and if they are put in power they must do their best to carry out the mandate they have received and keep faith with the electors.

#### Importance of Two-party System

Thirdly, it must be emphasized that the tendency towards a two-party system carries with it its own antidote. Conservative parties, that is to say, parties which, whilst recognizing the need for administrative reforms, do not wish to make fundamental changes either of a reactionary or a progressive kind, can usually preserve their unity without much trouble. But a progressive party is proverbially hard to hold together. The fact is, of course, that even in a country with a two-party tradition men do not naturally fall into two distinct groups. Men must sink many differences if they are to carry into effect policies which they have in common, and in this sense all parties are coalitions and require expert handling. In other words, political leadership is an art, part of the very difficult art of managing men.

Other checks, which arise from the character of our central and local administration and from our feeling for liberty must be left to be dealt with later. But enough has been said to show that the House of Commons and its relation to the electorate, while making for strong governments, provide substantial guarantees against tyranny. For centuries party government has done reasonably well what

the nation has required of it. Whilst the element of power politics has never been entirely absent, it has on the whole been subordinated to the will to conduct the business of the nation in accordance with the nation's wishes.

#### Parliamentary Procedure

Opponents of parliamentary democracy allude to Parliament opprobriously as a mere 'talking shop,' and others use the phrase often enough when in a grumbling mood. Well, that is what the word parliament means and to a great extent it describes the actual institution. But free debate is the very life-blood of democracy, and it is the glory of Parliament and not a reproach that it provides it so fully. It is true that Parliament not merely talks but does things. Are not the products of its legislative proceedings called 'Acts' of Parliament? Nevertheless the effective *action* of Parliament is done quietly and without much publicity, and its conspicuous activity is talk in the form of debate on questions and answers. This will be apparent if we examine the normal procedure of Parliament.

Procedure is governed by standing and sessional orders, which have been made by former Houses over a period of more than two hundred and fifty years and are still in process of development. These orders can be changed or suspended at any time by a mere resolution of the House but they are usually obeyed in their existing form and even suspensions follow well-marked lines.

#### Position of the Speaker

The fundamental organs of the House are the Speaker, who presides over debates in the House with his Deputy, who also acts as Chairman of Committees; the Leader of the House, who is either the Prime Minister or one of his chief political lieutenants, and the Leader of the Opposition. Both the Leader of the House and the Leader of the Opposition are assisted by a number of Whips under the command of the Chief Government Whip (who holds the paid office of Parliamentary Secretary to the Treasury), and the Chief Opposition



#### PARLIAMENTARY ELECTION CAMPAIGN

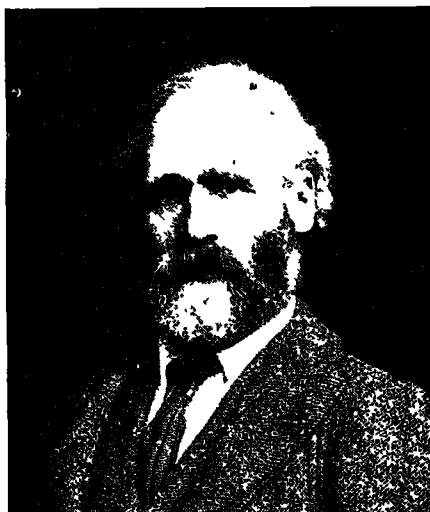
*The would-be Member of Parliament must face his electors, outline his party's programme and be prepared to answer probing questions. Even the Speaker of the House (who is normally "returned unopposed") addresses meetings of his constituents.*

Whip, whose duties are to secure the attendance of their supporters and, if possible, see that they vote in the right lobby.

The Speaker is primarily "lord of debate." It is his business to see that debates are conducted with decorum and, if possible, with effect. Thus he is empowered not only to check disorder, irrelevance and unparliamentary language or behaviour, to interpret authoritatively the standing orders and customary rules of debate, but also to decide who is to speak; for so little

time is available nowadays that only those who are fortunate enough "to catch the Speaker's eye" can hope to speak. The Speaker is guarded in his choice by many considerations. He will usually give a member a chance of making his first, or "maiden" speech, but generally he will choose those members who are likely to be in a position to make the best contribution to the debate; and, since he naturally wishes to give opportunities for the expression of all the main shades of opinion, it is





#### PIONEER OF SOCIALISM

*Great fighter for the Parliamentary representation of working people, Ken Hardie, M.P., helped to lay the foundation of the modern Labour Party's success*

notorious that members of small parties have a better chance of being called upon than those of the majority or of the official opposition. In fact, members apply to the Speaker beforehand, through their whips, so that his choice is by no means haphazard; and of course, the Leaders of the House and of the Opposition decide who shall be their principal speakers.

The Speaker has indeed other functions, but these, which include the vital one of certifying money bills under the Parliament Act, are all, like that of presiding over the House, essentially functions calling for strict impartiality. This impartiality is stimulated and assisted by the enormous prestige and traditions of the office, and by the uniform practice of over a century, according to which, though a new Speaker is generally chosen from the party in a majority at the time, he is re-elected by subsequent Houses as long as he is willing to serve, even though the balance of parties has changed.

It is also evident that the Speaker can be strictly impartial and can be kept in office indefinitely, mainly because it does not fall

within his province to arrange the business of the House (as does the Speaker of the American House of Representatives). That duty falls to the Leader of the House after consultation with the Leader of the Opposition. For most business is now Government business and the time of the House must be so apportioned, while allowing the Opposition enough opportunities to criticize Government bills and the conduct of administration, as to secure to the Government power to carry measures necessary to the proper functioning of the administration and to put into effect at least the more urgent elements of its party programme. This means that the Opposition, whilst entitled to call attention to the weak or dangerous points in the Government's measures, must not merely obstruct, and the avoidance of obstruction could not be attained by the action of the Speaker alone, who would be in danger of degenerating into an instrument of the Government of the day and might soon lose his authority over the House as a whole.

What actually happens is something like this: the Chief Government Whip sees the Chief Opposition Whip "behind the Speaker's chair" and says: "We must get the second reading of the Grey Squirrels Destruction Bill through by Tuesday evening. Will you get your people not to take too long over their criticisms?" To which the Chief Opposition Whip replies: "Yes, I think we can manage that; but you know we want to move a vote of censure on the Government for its failure to give adequate preference to Empire goods, and we don't want it to be held over too long. If we let you have your second reading by Tuesday evening, will you give us Thursday for our vote of censure?" Thus a bargain is struck.

But in fact, express bargains of this sort are probably rare. Either side is ready to accede to the other's reasonable requests. Thus the Leader of the House, who arranges the programme of the House, finds room in it for the business of the Opposition as well as of the Government.

Almost as if by accident there has arisen a curious demarcation between the occasions on which the Government and the

Opposition respectively take the initiative. Apart from private bill legislation, which is peculiar and must be reserved for later discussion, almost all legislation now originates with the Government. In normal times a fair number of bills are introduced by private members on both sides of the House, but the time allowed for discussing them is very small and they have no chance of becoming law unless either they are so uncontroversial as to encounter no opposition or the Government is prepared to give facilities for their progress and the opposition to them is not on party lines. Normally, however, it would be a pure waste of time for the Opposition to introduce bills and the Government, by its control of the majority, would see that they were rejected out of hand on the first reading. On the other hand, most of the time devoted to financial business is at the disposal of the Opposition.

Every year the estimates of future expenditure are laid by the various departments before the House, and it is left to the Opposition to decide which are to be subjected to discussion. The criticism is not usually on financial lines, for the House has neither the time nor, in general, the expert knowledge for a thorough-going examination. The Opposition picks a particular department because it wants to lay bare some defect of its administration, or because in its opinion the services provided by this department are not as adequate as the Opposition would ensure if it were given power to pass the necessary legislation or spend the necessary money or simply because it feels that the work of the department has not been discussed for a long time.

On all such occasions the Minister or his Parliamentary Secretary must be present to stand fire and to do his best to defend his department and his party's policy in relation to it. Thus the Opposition has opportunities for criticism and at the same time for party propaganda. It can also bring forward motions for the same purpose, the most important of which have for their object the passing of a vote of censure. On all these occasions the only point of dividing the House is to show

constituents that the Opposition members are doing their duty, the important thing is the debate, with the opportunities it affords for criticism and propaganda, and its fruits, if any, are to be plucked at the next general election.

However, the House is not merely an arena for warring parties, and it is still less a home for professional politicians. Of persons who are in the House for what they can make out of it there are very few. The pay, even at £1,000 a year, is too little to attract the avaricious, and there are no spoils. There are, of course, and must be, a certain number of members who hold or are on the way to high ministerial office, and who make politics their profession in the honourable sense of the term. But most members have to continue to carry on their businesses or professions at the same time as they are attending to their parliamentary duties. Thus they remain, in a sense, ordinary men of the world, representative of the various regions, interests and classes in the community, though, for the reason that a member is not bound to reside in his constituency, local affiliations are weaker than in most parliaments abroad. Indeed, the House as a whole thinks very much like the nation as a whole. It has a strong corporate spirit, and the whole is greater than the parts. The prestige of the Speaker is consciously enhanced by all members in order to emphasize the unity of the House.

#### "Sense of the House"

This unity is seen most conspicuously on exceptional occasions, such as the rejection of the Hoare-Laval agreement concerning Abyssinia in 1935, and the Abdication crisis of 1936. There is, however, always a "sense of the House," irrespective of party, with which governments know they have to reckon, and which shows itself if there is any hint of injustice or unnecessary concealment in its actions. It is misleading to regard this 'sense of the House' as something antagonistic to the Government, which, of course is supported by the majority of members, and is directed by ministers who are themselves members and are imbued with the same feeling. But



#### ST MARGARET'S WESTMINSTER

*An eighteenth century view of the church to which M.P.s traditionally repair on occasions of need or thanksgiving*

ministers and their departments are capable of making mistakes. When they do so, they may incur criticism from both sides of the House, while members of the Government look on, weighing the criticism and fully conscious that the "feeling of the House" is a real thing. The House though it now makes governments is not itself the government. But it has resisted governments in the past. And the ordinary private member of whatever party looks upon the departments and the success or failure of their policies with the same eyes as the man in the street.

This becomes most apparent at question time. Nearly an hour on four days in the

week is allotted in which members may ask questions of ministers, and even outside this time many questions are put and answered in writing, afterwards being published in the Official Report.

If questions are put merely for information, which it is intended to have published, the latter course is quite satisfactory and saves time. If, as is often the case, a Minister has suggested the question to enable him to make a pronouncement as to his policy, it is better that both question and answer should be made orally in the House. This is essential if a member wishes to criticize or embarrass the Minister, for on the latter's reply, the member can immediately ask supplementary questions which, as they have to be answered impromptu and may be unforeseen, are usually much more dangerous than the original one. Though no debate is allowed there and then members know as well as any barrister that a case can be stated just as well in cross-examination as in a speech to the jury. Only in the most exceptional circumstances, when the public interest demands secrecy, will a Minister refuse to answer either the original or supplementary questions, and although any government could use its parliamentary majority to do away with question time it



#### MEMBERS OF PARLIAMENT

*It is not often that M.P.s march in a body but here we see them on their way to a thanksgiving service at St Margaret's*

is inconceivable that it should take this extreme course, not only because it would be a breach of a tradition which has acquired constitutional force, but also because it would betray a disastrous lack of confidence in its own ability to justify its conduct

Unless a member suspects that party politics are at the bottom of it, he will always take up a case submitted to him by a constituent irrespective of party. Suppose, for example, that a constituent has tried and failed to obtain satisfaction from the Ministry of National Insurance on a pensions matter, he may write to his M.P. putting his case and enclosing copies of the Ministry's replies. The M.P., if he thinks his constituent has just cause for complaint, will probably first write to the Minister of National Insurance, who will see that inquiries are made. If the member is not satisfied with the results of the inquiry he will then put down a question to be answered orally in the House. This in effect gives the Minister a chance of reversing his previous decision or of defending it publicly; conversely, it gives the constituent a chance of getting publicity for his complaint

Generally speaking, if matters go as far as this, there is likely to be trouble, and the

mere possibility of a parliamentary question makes civil servants watch their step. If the member is not satisfied with the answer to his questions, he may move the adjournment of the House to discuss a definite matter of urgent public importance, and if the Speaker is satisfied that it is such and cannot be equally well discussed in the near future on some other occasion he will put the question to the House without debate. The member will then inevitably obtain the forty votes which are necessary to go through with the motion, which is discussed at 7.30 the same evening

Matters would not be likely to go so far as this unless the supposed injustice was serious and pointed to wrong methods which the department was not prepared to change. But if they do, the subsequent discussion will be relatively free of party politics, and members on both sides of the House will speak freely. If the Government—for the whole Government would be drawn in by this time—feels that public opinion is aroused, it will usually move for the appointment of a select committee of the House to examine the matter in detail. The committee will contain members from both parties and is required by tradition to perform its duties in an entirely non-partisan spirit, and the Government will



# A NEW POLITICAL CATECHISM.

1. Who introduced the House of Commons upon the Reduction of the French Subsidy?	William Pitt the Younger.
2. Who introduced the Education Bill?	Lord Almon.
3. Who introduced the Education Bill?	Lord Almon.
4. Who introduced the Education Bill?	Lord Almon.
5. Who introduced the Education Bill?	Lord Almon.
6. Who introduced the Education Bill?	Lord Almon.
7. Who introduced the Education Bill?	Lord Almon.
8. Who introduced the Education Bill?	Lord Almon.
9. Who introduced the Education Bill?	Lord Almon.
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12. Who introduced the Education Bill?	Lord Almon.
13. Who introduced the Education Bill?	Lord Almon.
14. Who introduced the Education Bill?	Lord Almon.
15. Who introduced the Education Bill?	Lord Almon.
16. Who introduced the Education Bill?	Lord Almon.
17. Who introduced the Education Bill?	Lord Almon.
18. Who introduced the Education Bill?	Lord Almon.
19. Who introduced the Education Bill?	Lord Almon.
20. Who introduced the Education Bill?	Lord Almon.

Who introduced the House of Commons upon the Reduction of the French Subsidy?

## GLADSTONE AND BRIGHT!

And yet SIR JOHN ALMON counts the Tories with denying the Franchise to the Working Classes, when his leaders opposed the reduction!"

### LIBERAL PROPAGANDA IN THE 1860s

"Who got us into a war with China?"—*The Liberals.*

"Who did everything wicked and wrong?"—*The Liberals.*

almost inevitably give effect to the conclusions contained in a strong report.

We must remember, however, that the main task of Parliament is legislation. All Acts of Parliament start as Bills, and all Bills are either Public (which includes Money Bills) or Private (not to be confused with Private Members' Bills, which, though not introduced by the Government, are Public). As early as the reign of Elizabeth it had become the rule that every bill

should have three "readings" in the House of Commons, which at first meant that it was read through to the House in the form it had reached at three different stages of its career. Now all that is meant by saying that a bill has passed a particular reading is that it has passed the stage at which it would formerly have undergone that reading.

The first reading is usually a formality. The member introducing the bill presents a blank sheet of paper having on the outside the name of the bill together with his own name and those of other members supporting him. Then the bill is ordered to be printed and is set down for a second reading at a later date. If it is opposed on the second reading there is a full-dress debate on the general principle of the bill, and if the House is in favour of it the bill is ordered to be read a second time and sent to committee, for consideration in detail.

There are generally three or four standing committees, known merely as Standing Committee A, B, C or D. One Standing Committee, which includes all the Scottish members together with a certain number of others, deals with bills which relate exclusively to Scotland, but the others are available for the consideration of bills of any kind.

Over and above this is the Committee of the Whole House, which is nothing more than the House itself meeting without the Speaker and under the presidency of the Chairman of Committees, and following a much looser procedure. (For instance, a member may speak more than once on a question.)

Whether a bill is committed to one of the

Standing Committees or to the Committee of the Whole House is a question to be decided on grounds of convenience. The advantages of using Standing Committees are that they can deal more effectively with bills containing technicalities and that more than one can sit at a time, the disadvantage is that members who have not been members of the Standing Committee considering a bill may insist on having their say at a later time on the floor of the House.

The purpose of the committee stage is to consider amendments. The procedure is not only looser, but Government supporters are free, at any rate in a Standing Committee, to propose amendments to their party's bill and even to vote against the Government. Not infrequently the Government will either agree to an amendment or accept a compromise, or even acquiesce in its defeat upon an amendment which does not vitally affect the working of the bill. If the bill has been amended in committee, the committee reports the results of its deliberations to the House, and at this Report stage the House decides, if necessary after debate, which amendments, if any, it will accept. Finally, there is a third reading, when only formal or verbal alterations are allowed. The House again discusses the bill as a whole and decides whether or not it should become law.

If a bill successfully passes all stages in the House of Commons, it is then sent to the House of Lords, where much the same procedure is gone through, though usually more quickly. This further consideration is useful, even if the Lords agree with the bill, for it gives the Government an opportunity of looking through the bill carefully

The Tory Government's expenditure for 1905-6 is

**48 MILLIONS A YEAR**

more than that of their Liberal predecessors, or considerably more than

**A POUND A HEAD A YEAR**

for every

**MAN**

**WOMAN** and

**CHILD** in the United Kingdom.

For every £2 spent by the **LIBERALS**, the **TORIES** spend over **£3**.

Most of the increased expenditure is on the **ARMY** and **NAVY**. In the last Liberal year (1894-5) the amount spent on the Army and Navy was 35½ millions; in this year's estimates (1905-6) the amount is 63½ millions—or an increase of nearly 28 millions in 11 years.

You have to thank the Tory Government for

The Taxes on Sugar and Coal,

Extra Taxes on Tea (2d.) Tobacco, Beer, Spirits,

and an Increase of 4d. in the Income Tax.

**CLEARLY TORYISM IS A  
COSTLY LUXURY!**

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LIBERAL PROPAGANDA IN THE EARLY 1900s

*"You have to thank the Tory Government for extra taxes on tea (2d.) . . . and an increase of 4d. in the income tax."*

in the amended state it has finally attained in the Commons and of securing further amendments, of a technical character.

Technical amendments proposed by the Government will always be accepted by the Commons when the bill is sent back to them. If the amendments are not suggested by the Government and are substantial, the Commons will have to consider whether they will accept them or whether some compromise can be achieved. If they insist on

having the bill in the state in which it left them (i.e. without the Lords' amendments), or if the Lords reject it completely the Commons must decide whether they will try to pass it over the Lords' veto under the Parliament Act.

Most public bills originate in the House of Commons, but quite often bills are introduced in the first instance in the House of Lords, especially bills for the purpose of altering private law, for instance, bills to amend the law of property or contract which as a rule are not of a partisan character, and the House of Commons is generally willing to accept them without much debate. When a bill has been approved by both Houses, it is presented to the King for the royal assent.

#### Lords and Money Bills

This description does not apply in its entirety to either financial measures or private bills. Money bills must be introduced in the House of Commons and can be neither amended nor rejected by the House of Lords. Further, any bill which has for its purpose the spending of money or the imposition of a charge on the subject must be introduced by a financial resolution, such a financial resolution cannot receive a second reading without a recommendation from the Crown, and it must be introduced in Committee of the Whole House.

Ever since Gladstone had his famous dispute with the House of Lords in 1860 over the Paper Duties, it has been the practice to concentrate all the year's proposals for taxation in a single budget, which is a statement of proposed expenditure for the year and the taxation or other financial expedients required to meet it. The Chancellor of the Exchequer introduces his budget in Committee of the Whole House, which for this purpose is called the Committee of Ways and Means, and at the close of his speech resolutions are at once passed upon which taxes are provisionally levied pending the passing of the necessary Act of Parliament. When the House is considering the spending of money, or, in other words, is providing for the needs of government, it again goes into

Committee of the Whole House, which in this instance is called the Committee of Supply. Eventually from the Committee of Ways and Means emerges the Finance Act for the year, imposing Income Tax, which requires annual renewal, and introducing necessary modifications into the taxes which are permanent.

From the Committee of Supply come one or two Consolidated Fund Acts granting money to the Crown and later these Acts are superseded by an Appropriation Act which gathers up the grants and specifies in some detail the purposes for which they may be used.

In the meantime the estimates presented by the various government departments have been considered in Committee of Supply. It is open to any member to propose a cut in expenditure but not an increase, so that the rather ludicrous proceeding is often encountered of a member proposing a cut of £100 in a minister's salary because his department is not, in the member's opinion, spending enough. None the less, the rule that a private member may not propose the expenditure of public money protects him from the pressure of local or other interests which might otherwise prove embarrassing.

#### Private Bills

The procedure on private bills, which though formally introduced by members of either House are promoted by persons or bodies outside Parliament, is more complicated. No accurate demarcation can be made between what can be done by public and what must be done by private bill, but generally speaking if a bill is promoted for the purpose of altering the law with respect to a private individual or to confer special powers on a single local authority or public utility company, it must be introduced as a private bill. The most important private bills are promoted by local authorities, and most of the advances in the social services which are administered locally have been initiated by progressive local authorities asking Parliament for special powers, and only later universalized by Parliament itself in such general legislation as the Public Health Acts. Private

bill legislation has been called the laboratory of local government

Since private bills usually seek to interfere with the rights of persons other than the promoters, as for instance by taking property compulsorily for public purposes or interfering with the activities of an existing public utility, the procedure is regarded as a controversy between the promoters and opponents of the measure, and accordingly not only has an elaborate set of rules been devised to ensure that full notice shall be given to all persons likely to be adversely affected, but the committee stage, in which consideration of a bill is usually concentrated, takes on the character of a judicial hearing, at which the parties appear by counsel and evidence is given for and against the bill. The House of Lords takes its full share of private bill legislation, about half the bills being introduced in the first instance into that House.

A private bill committee in the House of Lords is composed of five peers, in the House of Commons of four members. The committees act without partisanship in a judicial spirit and report their findings to the House, which usually accepts them, unless some great decision of principle is involved which does not commend itself to the majority.

This however, is not very likely to happen, for most private bills have to be communicated to the relevant government departments, which may make representations to the committee concerning the public aspects of the bills. A bill which has passed one House must go through the

same stages in the other House, but commonly the opponents of a bill decide not to carry their opposition into the second House, perhaps because they have received certain concessions from the promoters.

Private bill procedure, which is peculiar to British legislatures, is expensive, not only because fees have to be paid at various stages of the proceedings, but also because promoters and opponents of bills have to employ expensive counsel and parliamentary agents. Accordingly a more expeditious and less costly method has been devised. Various statutes have given certain government departments power, after holding a public local inquiry, to make Provisional Orders, which are scheduled to a bill and presented to Parliament for its approval. When passed they have the effect of statutes. The judicial element present in private bill procedure appears in the public local inquiry.

On the other hand, private bill procedure has been much praised by foreign observers because it removes most legislation affecting local and private interests from the floor of the House and therefore from party controversy. Thus it takes away from the ordinary private member the temptation which besets members of most other legislatures, that of currying favour with his constituents by pressing their claims against those of other persons or localities, while at the same time leaving him free to perform his duty of protecting them in the exercise of rights which they have in common with the rest of the community.

### *Test Yourself*

- 1 What is meant by "parliamentary sovereignty"?
- 2 How long does a modern Parliament last in the usual way?
- 3 What are the qualifications of a parliamentary elector?
- 4 What are the "conventions of the constitution"?
- 5 What is the doctrine of the "mandate"?
- 6 What are the uses of a parliamentary question?
- 7 Through what stages must a public bill pass in order to become an Act of Parliament?

*Answers will be found at the end of the book.*





#### LOCAL GOVERNMENT VOTING

*In local government the people's representatives are elected by residents, the system of voting being similar to that of national elections. In the picture above, a count of votes is being made, counters being on one side of the table, scrutineers on the other.*

# BRITISH LAW AND GOVERNMENT: CENTRAL AND LOCAL ADMINISTRATION

THE word *government* suggests ordering people about and seeing that they do what they are ordered to do. But these are only incidental functions of what is sometimes termed the executive, or more commonly simply the Government. The task of the Government is not limited to executing the laws, as the term "executive" suggests, much of it consists in providing services for the public. In the United Kingdom the Government cannot of itself determine what those services shall be, nor can it raise the necessary money, these functions belong to Parliament, which will lay down in a statute the principles upon which the service is to be conducted, but it is the Government which actually provides and conducts the service. Perhaps we ought to say, not *the* Government but more shortly *government*, for not only the central government, but also local government authorities perform these functions.

It is indeed not a matter of constitutional principle but of policy whether a particular service shall be run by the Government, or by local authorities, or by private persons or companies, or by public corporations such as the Port of London Authority, or the B B C or the Coal Board, which have much of the independence characteristic of an ordinary company, though ultimately responsible to Parliament.

## Traditions of Government

But it is even more often a matter of tradition. Certain services, such as foreign policy, defence and the more important parts of justice, have for centuries been provided by the central government in the name of the King. On the other hand, the greater part of internal government until a little over a hundred years ago was left to be effected by local officers, such as justices

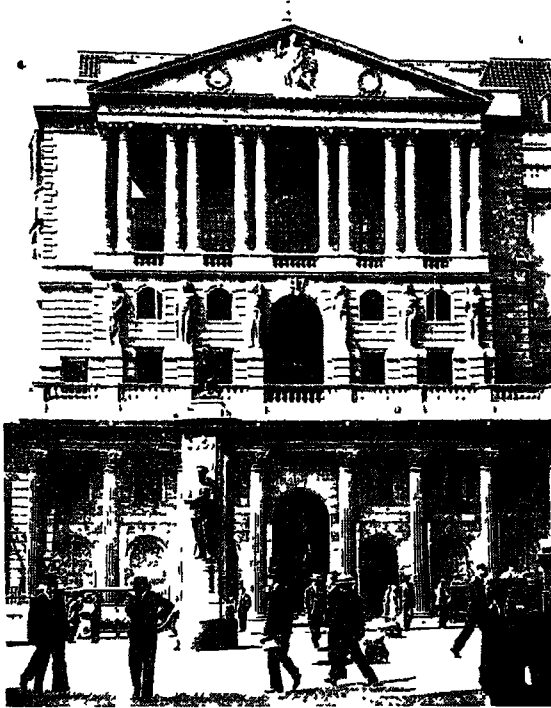
of the peace, constables and overseers.

There was the same diversity in the means of raising money to pay for services, for while justice and law and order paid for themselves in voluntary service or by fees, and fires, the King had to ask Parliament for grants to maintain the armed forces, and the local justices levied rates to cover the cost of poor relief and the maintenance of highways and bridges.

All these ways of financing services have survived, supplemented by others; and it is perhaps not too much to say that finance has always been the heart of English government. In peacetime at least, almost all questions become in the end questions of cost or, what is much the same thing, of priority. The Treasury, therefore, has long been the most important government department, and its political head, the Chancellor of the Exchequer, is usually the Prime Minister's most influential lieutenant in the Cabinet.

## Task of the Treasury

The task of the Treasury is to examine the estimates of future expenditure submitted to it by each department, and to force the department to prove its case for every proposed increase. It is for the Treasury to suggest that services can be run more cheaply, and to use its expert knowledge to propose the precise changes necessary. Since much of the expenditure incurred by a department is on the salaries of civil servants, the Treasury exerts a strict control over establishments and staffing, it makes rules for and maintains discipline throughout the civil service, of which the Permanent Secretary to the Treasury is head. It is also for the Treasury to advise the Chancellor of the Exchequer as to the best ways of raising money. If it is decided



#### BANK OF ENGLAND TODAY

*Set up originally by seventeenth-century merchants and long a link between the Government and the money market, the Bank of England is now in fact, no less than in name, the national bank.*

to raise money by loan, the Treasury has access, directly, and indirectly through the Bank of England, to the money market and can advise as to the interest to be paid and the terms of repayment of the principal. If taxes are to be levied, the Treasury uses the services of two departments which are subordinate to it, the Board of Customs and Excise and the Board of Inland Revenue.

But although the Treasury<sup>p</sup> can try to insist on economy by the various departments, it cannot decide priorities between them. That is for the Cabinet; and if it comes to a real contest between Ministers who are unwilling to give way to each other, only the Cabinet can decide between them. Usually, however, the dispute will

have been the subject of discussions between the rival departments and the Treasury for a long time previously, and the Ministers at the head of them will have been closeted with the Prime Minister. These are matters of the highest policy, and can seldom be settled on any but the highest level. However, the Treasury can not only try to reduce the cost inevitably associated with new schemes, but can also from its special knowledge give the Chancellor of the Exchequer ammunition which he can use to show that the proposals are likely to be more expensive than their supporters allege them to be.

A special financial department, the Exchequer and Audit Department, controls the issue of money for public purposes and audits the accounts of Government departments. At its head is the Comptroller and Auditor-General, who, though appointed in the usual way from the civil service, has the same security of tenure as the judges, for he can be removed by the King *only* upon an address from both Houses of Parliament. He is, in fact, more closely associated with the House of Commons than with the Crown.

Since the days of the younger Pitt, British Government finance has been noted for its extraordinary concentration. All Government moneys are paid into and drawn out of a single fund, the Consolidated Fund, which is nothing more nor less than the Government account at the Bank of England. Formerly, when expenditure was incurred under a new head, a new tax was imposed to meet it; so that there were a number of different accounts, some of which had a credit and others a debit balance. Similarly, when a loan was raised, it was charged upon a particular

tax, in other words, the stockholders looked to its proceeds for payment of their interest and regarded the continued existence of the tax as their security. The whole procedure was complicated and unbusinesslike, and it was a great step forward when Pitt established a single account and charged the whole of the national debt on it, prescribing further that any unexpended balance should go automatically to reduce the debt.

#### How the Fund Works

Into the Consolidated Fund are paid all moneys accruing to the Crown—that is to say, not only the proceeds of taxation, but money from all other sources except those which arise from the estates of the Duchy of Lancaster and the Duchy of Cornwall, the former of which go to the King in any event, the latter only if he has no son to enjoy them as Duke of Cornwall. Formerly the proceeds of all Crown lands were paid directly to the King, together with certain excise duties settled on him for life, but out of them he had to pay many of the costs of government, including, for example, the salaries of the judges. However, by gradual stages the King has come to

surrender at his accession all his hereditary revenue and has received in return a Civil List Grant, in other words, a salary on which to maintain himself and his family and pay for the upkeep of his court.

Money is drawn out of the Consolidated Fund by a process designed to ensure that no money shall be issued to a department to be spent by it without the approval of the Comptroller and Auditor-General whose subordinate officials see that every issue is covered by an authorization from Parliament. Concurrently there proceeds an audit of each department's accounts to ascertain that money has been spent in accordance with the legal requirements of statute. At the end of a year or so the Comptroller and Auditor-General presents the accounts with his observations to the Public Accounts Committee of the House of Commons which in its turn reports to the House. Any criticisms of departmental methods are communicated to the departments by the Treasury. From time to time the House also sets up a Select Committee on National Expenditure which examines the accounts not from the point of view of legality but of economy.



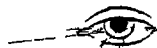
TREASURY, WHITEHALL, A HUNDRED YEARS AGO

*Most powerful of all Government departments, since no payments can be made by any other department without Treasury sanction, it is controlled by the Chancellor of the Exchequer.*



## THE STATE AND THE CITIZEN

*In a democracy the apparatus of the state exists to further the life of the citizen as a whole, and there are many necessary points of contact between the state and the life of the citizen*





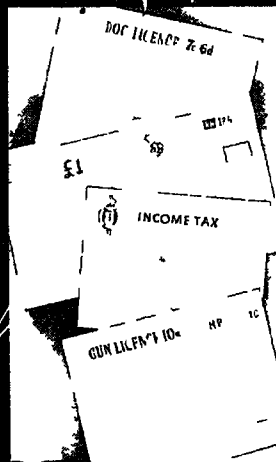
VACCINATION AND  
IMMUNISATION



EDUCATION



MARRIAGE



TAXES



EMPLOYMENT  
EXCHANGES



RETIREMENT  
PENSIONS

*Leslie S. Haywood*

There can, however, be little doubt that the Treasury (the great nineteenth-century department) has been losing some of its authority over the other departments, and the Cabinet which is supplanting it as the chief controller of finance, has had to provide itself with an organization for this and other purposes. Before the First World War the Cabinet was a very informal body, meeting often enough, but without any regularity, during the sessions of Parliament. Its meetings were so secret that only the Prime Minister was allowed to take notes during them, and the sole record of its proceedings was to be found in a private letter which the Prime Minister wrote to the King immediately after a meeting. On the whole this informality worked well, but during the First World War it became apparent that the Cabinet must become a more businesslike body.

#### Cabinet Procedure

During the First World War the old Cabinet of some score of Ministers was replaced by a small compact War Cabinet of five or six in almost continuous session and supervising the whole conduct of the war. Most Ministers were outside it and took their orders from it, being present if anything was being discussed which peculiarly affected them. This War Cabinet established a regular secretariat, and it also worked through special committees for various purposes.

Much of this organization has lapsed, but the Cabinet Secretariat remains. The secretary or his deputy is present at all Cabinet meetings, for which on the directions of the Prime Minister he prepares agenda, and of which he writes and circulates the minutes. With this exception however, the Cabinet remains as secret as ever. But it is understood that all Cabinets have a committee, known as the Legislation Committee, which is presided over by the Home Secretary and approves the final draft of bills before they are introduced into Parliament. Moreover, the Defence Committee, which includes all Ministers closely connected with defence problems and is in contact with Dominion representatives assists the recently con-

stituted Ministry of Defence in its work of co-ordination. The Labour Government of 1929-31 also established an Economic Advisory Council.

#### Wartime Cabinets

During the Second World War the War Cabinet was modelled on similar lines to the First World War, and it built up an elaborate organization with many specialist advisers of one kind or another, in fact, the offices of the War Cabinet became little less than another department controlling the others. How much of this organization will survive is uncertain—the Cabinet has already expanded almost to its pre-war size—but government is now inevitably so complicated that the Cabinet, and the Prime Minister, in particular, can hardly hope to control it without a highly developed organ at the centre.

Besides finance, which pays for all, the primary tasks of the central government have been the conduct of foreign affairs and the control of the armed forces and the relevant departments, are now the Foreign Office, the Admiralty, the War Office and the Air Ministry. They all act in virtue of statutory powers, and also of the royal prerogative, a term which needs some further explanation.

#### The King's Prerogative

The oldest part of English law is that law which was built up by the King's courts on a basis of custom and reason from the twelfth century onwards, and is known as Common Law. Now Common Law attributed certain rights, powers and immunities to the King by reason of his royal dignity and in order to enable him to govern the realm and to defend it against external enemies and those rights, powers and dignities were and are known as his prerogative. Vast powers have since been conferred on the King by Acts of Parliament, but these are not technically prerogative powers. Much of the royal prerogative has from time to time been taken away by statute, in particular the King cannot now, without Parliamentary sanction, either tax the subject or spend public money or make

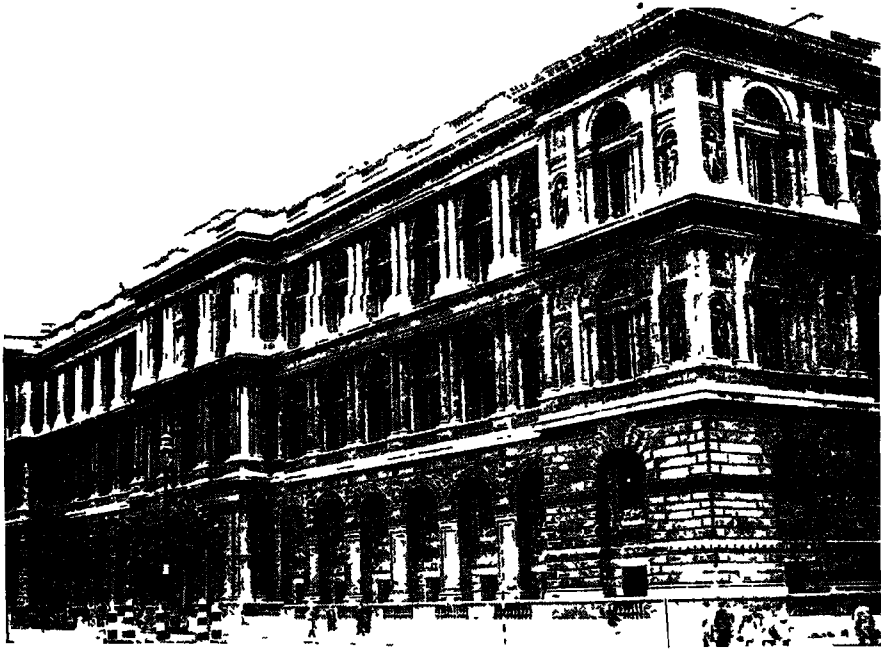
laws which will bind the subject. Moreover, the King now acts in all matters of government on the advice of his responsible Ministers, and so the prerogative has ceased to be the personal power of the King, and is exercised by the Government.

But although it is the Government that now conducts foreign affairs and warlike operations, it does so for the most part in virtue of the royal prerogative. Thus it is by prerogative that it makes treaties which bind the nation, though it needs the consent of Parliament in order to give effect to treaties which involve financial commitments or a change in the law—a restriction which is of great importance since many treaties are now commercial treaties modifying tariffs.

There is a similar interlocking of prerogative and statute in the control of the armed forces. In 1689 the Bill of Rights enacted that "the raising or keeping of a standing army within the kingdom in time

of peace, unless it be with the consent of Parliament, is contrary to law." But, since the country was at war with France, Parliament sanctioned the keeping of a standing army for one year, in the hope that eventually it might be abolished. That hope has never been realized, but it has remained the practice to pass every year an Act, now known as the Army and Air Force (Annual) Act, continuing the army and air force in existence for another year, fixing its numbers (in time of peace) and making such modifications in the legislation regarding it as have been found necessary. The need to pass this Act is one of the safeguards for the annual meeting of Parliament.

Discipline had also been a difficulty. The prerogative power, such as it was, to maintain discipline in the armed forces, under the title of martial law, was abolished in 1628 by the Petition of Right, and Charles II and James II had to govern their



HOME OFFICE, WHITEHALL

*The Home Office (seen above) and the Ministry of Health are the two chief Government departments to which local authorities are accountable*



armies by expedients of doubtful legality. But in 1689 Parliament found itself squarely faced with the problem of coping with a mutiny of the troops waiting at Ipswich for embarkation to the Low Countries, and passed a Mutiny Act, to be in force for only a year. Thereafter, the discipline of the army rested on a statutory basis, successive Mutiny Acts developed a whole code of military law, supplemented by Articles of War (later King's Regulations) issued by the Crown under statutory powers, and eventually the whole code was summed up in an Army Act, which is brought into force afresh every year with the necessary alterations by the Army and Air Force (Annual) Act. The name of that Act shows that when the Royal Air Force was brought into being in 1917, it was subjected to the same regime, the Army Act being modified slightly to form the Air Force Act.

Neither Parliament nor the country at large has ever shown the same jealousy of a permanent navy, and so the Royal Navy does not need to be sanctioned afresh every year. Its discipline was placed on a permanent footing by the Naval Discipline Act, 1662, now re-enacted with modifications as the Naval Discipline Act, 1866.

#### Armed Forces and the Law

Members of the armed forces are subject to two laws, military law and the law of the land, applicable to them as to ordinary citizens. The mere fact that they become subject on enlistment to a special body of rules regulating discipline does not exempt them from obedience to the general law. Military law is no more repugnant to the ordinary law than are the rules of discipline in the civil service or in a factory, but there is, of course, this important difference that, whereas a civil servant or workman will, at the worst, forfeit employment and pension rights for disobedience, a member of the armed forces will be tried and punished if he disobeys the lawful orders of his superior officer. Ordinarily there is no difficulty in reconciling his civic with his military capacities.

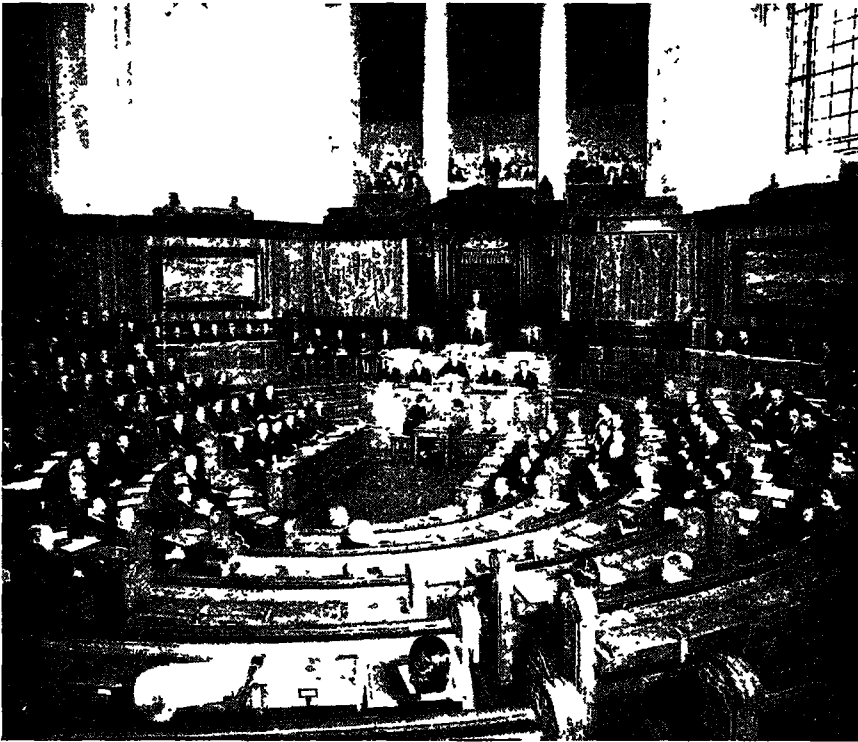
Suppose, however, that a body of troops is called out to suppress a riot and the

commanding officer comes to the conclusion that he must order his men to fire. Then, it has been said, a private soldier is in a dilemma: if he obeys his superior officer and kills one of the rioters, he may be tried by a judge and jury for murder and hanged, whereas if he disobeys orders he may be shot by a court-martial for disobedience. Put this way the dilemma is absurd, for if shooting to kill is necessary to suppress the riot, it is not murder, but justifiable homicide, and if it is not necessary, then the superior's order was unlawful, and a soldier is obliged to obey only the lawful orders of his superior officer. There can, however, be a difficult conflict in the soldier's mind, for he may not know whether his superior is justified in ordering him to shoot. The probable answer is that a soldier will not be criminally liable if he obeys an order from his superior officer which was not clearly illegal.

#### Position of the Post Office

The one other service of long standing which is managed entirely by the central government is the Post Office, which, besides carrying letters and parcels, runs the telegraphs and telephones, and a savings bank. But in some ways its most valuable function from the point of view of government is that it has established an office in almost every village, which can be used for all manner of purposes such as the sale of insurance stamps and the payment of pensions. Until 1933, all profits from the Post Office were taken by the Treasury for the relief of taxation, but strict Treasury control was found to hamper the development of its services and to deprive those who managed it of incentives to increase efficiency. Accordingly, in that year a new arrangement was made by which it pays over a fixed sum to the Treasury every year and is allowed to use the balance for purposes of development and extension. It has at last become very much of a socialized undertaking, and although the Postmaster-General is a Minister responsible to the House of Commons the department is run like a business by a board of high civil servants.

All other government is traditionally



#### PARLIAMENT OF THE COUNTY OF LONDON IN SESSION

*The London County Council was created in 1888, and consists of 124 councillors, who come up for election by the ratepayers every three years, and 20 aldermen, elected by the councillors and holding office for six years. The chairman is elected in council. The L.C.C. is the most important and powerful organ of local government in London.*

local government. Paradoxically this peculiarly English feature is due, not to any failure to initiate or accomplish a policy of centralization, but to the fact that the English monarchy was the first medieval government to extend its effective power throughout the realm. To do this the King had to use the local leaders of society as his local agents and to control them by sending his own officers periodically round the country. At first the main task of local administration was the preservation of law and order, and the justices of the peace, on whom it mainly fell, exercised primarily a criminal jurisdiction. This meant that the activities of the chief local administrators, being mainly judicial, were controlled, not

by a central political executive which might have imposed a uniform policy on them, but by central courts which corrected their mistakes of law, they, therefore, enjoyed considerable independence.

There was indeed a period, during the reigns of the Tudors and the first two Stuarts, when the Justices of the Peace, having by this time been entrusted with extensive administrative powers over such matters as poor relief, bridges and highways, were subjected to the political control of the Privy Council and Star Chamber, but this phase passed, and after 1660 at any rate the justices were, in respect of both judicial and administrative functions, under the control of the law and of nothing



else—which left them remarkably free to carry out their own notions of policy within the limits of their powers.

The old system had the merit of making a large number of persons use their intelligence and judgment in the service of government; and so long as the problems it had to solve were those of a fairly simple rural society, it worked well. But it was quite incapable of dealing with abnormal lawlessness or with the new conditions produced by the Industrial Revolution, and after much experimentation an entirely new system of local government, covering both town and country, was gradually built up on fairly uniform lines. Though the authorities administering local government are now quite different from their eighteenth-century predecessors, being more closely controlled from the centre, they have inherited their two main characteristics: the primary control is one of law, and they enjoy considerable freedom as regards the formation of policy and the detailed work of administration.

#### Local Authorities

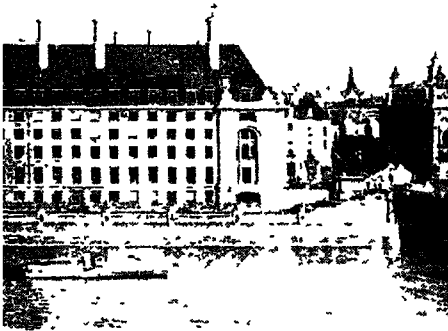
The typical modern service is administered by elected local authorities in virtue of powers conferred by Parliament, but controlled administratively to some extent by central government departments, and judicially by the ordinary courts of law.

On the other hand, in such matters as the provision of markets or tramways, and in municipal trading enterprises generally, which are of more localized interest, the control exercised from the centre is less strict. Lastly, there are some important services, such as factory inspection, national health and unemployment insurance, which are performed by the central departments through their paid officers.

The boundaries of local authorities and indeed the whole structure of local government are now under consideration by a Boundary Commission: but at present for local government purposes the country is divided into administrative counties and county boroughs. The latter, which comprise most of the largest cities and towns (with the exception of London, which has a special organization), are not further subdivided, the county borough council is responsible for all local government services in its area. Administrative counties, on the other hand, are subdivided into urban and rural areas. Urban areas, which may either be urban districts or enjoy the greater dignity and somewhat wider powers of municipal boroughs, are not further subdivided, but in rural districts parishes have some small powers of local government. London has its own county council, but is subdivided into the original City of London and a number of

## COUNTY HALL, LONDON

*Headquarters of London County Council, County Hall is situated in Lambeth on the south bank of the Thames*



**Metropolitan Boroughs** The City is for most purposes, but not all, independent of the London County Council, the metropolitan boroughs, though not unlike municipal boroughs in the provinces, do not stand in quite the same relation to the London County Council as municipal boroughs do to the councils of the counties of which they form part.

Thus in county boroughs there is a one-tier, in other urban areas a two-tier, and in rural areas a three-tier system of administration. However, this statement, unless amplified, is likely to cause misunderstanding. Parish councils and parish meetings are not in a general way subordinate to rural district councils, nor district councils or municipal boroughs to county councils. Each of these kinds of authority was originally set up to administer separate services, according as they seemed to call for small or medium or large-scale administration, and although the tendency has been for the county councils to take over from the smaller authorities work which they had proved too poor to finance, and to use the latter as their agents, the various authorities are still largely independent of each other, and all deal directly with the central departments which control them.

Among the most important county services are education, main roads (other than trunk roads which are maintained

directly by the Ministry of Transport), police (through a Standing Joint Committee of the County Council and the Justices), and such part of public assistance as has not been taken over by the Assistance Board. Rating and valuation, public health—a term of very wide application—roads in urban areas and by-roads in rural areas are the province of district councils and municipal boroughs. Parish councils and parish meetings (all rural parishes have meetings, but only the more populous have councils) have a number of miscellaneous powers, the most important of which, owing to the restrictions on spending powers in the parish, are the protection of parish property and the power to make representations to the rural district council and, if necessary, to the county council in relation to such matters as public health, housing or water supply. Municipal boroughs and urban district councils have parish powers as well as district powers, and county boroughs, even more independent, have all these powers as well as those possessed by a county council.

This division of powers is important because all local authorities derive their powers from Acts of Parliament and, by reason of the doctrine of *ultra vires*, act illegally if they exceed their powers; but in a well-run county there is likely to be much co-operation between them, and in the creation of new and the revision of old schemes, which take place from time to time, there is a tendency to use in conjunction authorities on different levels, the larger ones providing money, general direction of policy and advice on administration, but using the smaller ones as their agents to do the actual work, and it must be remembered that although the authorities are separate, there is nothing to prevent the same person, if he has time to spare, being a member of two or more councils.

Local councillors are elected by the local electorate, on a franchise even wider than the parliamentary franchise. Councillors



CITY COUNCIL IN SESSION

*Municipal government in the provinces has its own dignity and efficiency, as may be seen from this photograph of the city council of Cardiff in session. Town councils are empowered to cope with many local problems. Councillors are elected by the ratepayers.*

are elected for three years and councils are not subject to dissolution. Continuity is aided in county and borough councils by the presence of aldermen, who are elected for six years by the councillors, but apart from their tenure, aldermen do not in any way differ from councillors, with whom they sit and vote in a single chamber. In addition, borough councils elect from among their members or outside a mayor (in eighteen of the largest boroughs called "Lord Mayor"), who presides over council meetings and also represents the borough for social and ceremonial purposes. All other councils elect a chairman from their own members.

#### **The Committee System**

Councils do their work mainly by committees. Some committees are required to be appointed by statute, and of these the

Watch Committee in a borough, not the council itself, is the police authority while in those areas which are units for education the Local Education Authority is a committee appointed by the council and includes persons co-opted from outside the council. Otherwise few generalizations can be made. Only the council itself can levy a rate or if, like a county council, it cannot levy rates, issue demands for the money it requires to the rating authorities in its areas or authorize the use of the corporate seal (and thereby alienate council property), and all committees report periodically to the council as a whole, but whether the council trusts its committees to administer the various services without much interference or insists on all but the most trivial matters being referred to it is for the council itself to decide. The com-

mittee system allows much flexibility and variety in methods of administration

But, of course even a committee, however expert its members may become by specializing in a particular field, cannot do the actual day to day work of administration. This is done by paid officials who stand in somewhat the same relation to the councils and committees they serve as civil servants to their Ministers. They carry out the lawful orders of the councils and give advice when required to do so. Where a highly technical service is concerned, such as the management of a tramway undertaking the manager will stand in the same sort of relation to his committee as the general manager of a company to his board of directors. The supervision of an efficient committee over the running of a department, however tends to be closer than that which a Minister can exercise over his

#### Control by Courts and from Centre

Local authorities have all along been subject to the control of the courts of law. If they overstep their powers or neglect to perform their duties any person injured by their acts or omissions may apply for redress to the High Court, which has power to quash their decisions or order them to act. But judicial control is now less important than that exercised by the departments of the central government.

This departmental control has grown out of the new problems created by the Industrial Revolution, which led to an immense growth in the size and activity of the central government. The first expedients were tentative enough and, though they have survived did not provide good models for imitation. The Metropolitan Police, founded in 1829 by Sir Robert Peel, has remained where he put it, under the direct control of the Home Office, elsewhere the police have been organized in local forces, each under the control of a local authority but inspected by the Home Office. The first important Factory Act of 1833 established a body of factory inspectors, again appointed by and under the direct control of the Home Office, doubtless it was thought unwise that these

should be appointed by local authorities when those authorities were themselves controlled by the very manufacturers in whose factories the abuses which it was sought to bring to light were suspected to be. Again, under the new Poor Law of 1834, the Poor Law Commissioners treated the locally elected Guardians very much as servants whose only function was to apply to concrete cases the rules laid down in the minutest detail from the centre. But in the more modern services, such as education, the practice has been for the central department to leave the primary inspection to the local authorities and, through inspectors appointed by the central department, to ensure that the local authorities are doing their work properly.

This characteristic English method of combining administration by locally elected authorities with control by departments of the central government came only gradually after many experiments. It required for its elaboration much experience on the part not only of local councillors and aldermen but also of Ministers and civil servants, and it was not until the seventies that our modern methods tended to become fixed and that the great departments which now control local government began to be formed.

Let us glance at these departments. The chief of them, which controls all such matters as do not clearly fall within the ambit of any other department, is the Ministry of Health, the successor of a department called the Local Government Board and of the National Health Insurance Commissioners. It controls public health, housing, public assistance and many minor services, but its approval is also necessary before any local authority raises a loan for any purpose whatever, and it exercises a general supervision over all local authorities.

A much older department, the Home Office, controls the police administration, together with a number of other services. Moreover, the Home Secretary exercises some of the functions exercised by a Minister of Justice in other countries, for he appoints stipendiary and police magistrates and decides whether convicted

criminals shall be pardoned, he is also responsible for the activities of the Prison Commission

The other great departments which control the acts of local authorities are the Ministry of Agriculture and Fisheries, the Ministry of Education, the Ministry of Transport, and the Ministry of Town and Country Planning

Another old department, the Board of Trade, which deals with general trade policy and the non-judicial administration of the Bankruptcy and Companies Acts, and two twentieth-century departments, the Ministry of Labour and the Ministry of National Insurance, administer their services directly, like the Post Office, through their own local officials

#### The Civil Service

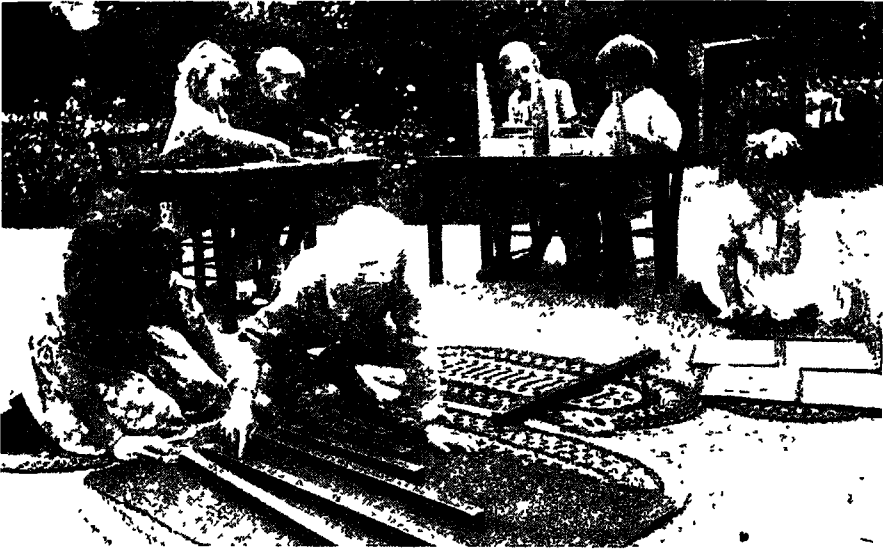
This enormous development has necessitated a thorough organization of the Civil Service on uniform lines. Originally the work of government was done by persons who were in fact as well as in name, members of the Royal Household. Then with the development of Cabinet govern-

ment they came to be recruited by patronage, or in other words Ministers appointed their subordinates. There was no real spoils system such as obtained in the United States during most of the nineteenth century and still obtains in many of its constituent states, for, once appointed an official could expect to be retained so long as he was in good health and reasonably efficient. Many of the persons so appointed were very able, but the general level of efficiency was not high and the system played too much into the hands of the landed aristocracy. Accordingly about the middle of the nineteenth century competitive examinations were introduced first for the Indian Civil Service and then, in 1870, for the Home Civil Service. A Civil Service Commission was set up through the initiative of Gladstone, which was alone empowered to admit persons to the Service and gradually by its regulations the Civil Service was divided into several grades or divisions, each of which, with the exception of the professional and technical appointments, doctors, lawyers, engineers and the like, has its own competitive entrance



HARSH AIR OF A VICTORIAN CLASSROOM

*The typical classroom of the nineteenth century with its rigid discipline and limited syllabus is in striking contrast to the liberal and friendly atmosphere of the modern school*



#### TODAY THE YOUNGEST LEARN WHILE PLAYING

*A large proportion of the monies raised by rates in any local government area is expended on health and education. Of recent years the nursery school (illustrated above) has come into prominence. The children are taught to be sociable and self-reliant.*

examination devised to select the best candidates at various stages of their educational careers.

The general organization of the Service is into three grades, the administrative, the executive and the clerical, to which must be added shorthand typists, messengers, manipulative workers (especially in the Post Office) and industrial workers. Speaking generally, appointments in the three higher grades are made as the result of examinations. Candidates for the administrative grade sit for these examinations at the end of their university careers, for the executive grade, at the age of eighteen or nineteen; and for the clerical grade, at the age of sixteen or seventeen: but there is a certain amount of promotion from one grade to another.

All civil servants, except the Comptroller and Auditor-General and his Deputy, who are virtually unremovable, hold their posts at the King's pleasure, which means that in law they can be dismissed without notice and without any reason being assigned.

Moreover they cannot sue for their pay, and the pensions provided under the Superannuation Acts are entirely at the discretion of the Treasury. In practice, however, they are not dismissed except for incompetence or misconduct, and questions of pay and service conditions are regularly discussed by Whitley Councils, on which the employers' side is represented by persons in the administrative grade and the staff side by persons chosen by the other grades. In case of disagreement it is common to submit the case to the Industrial Court, whose decisions are usually accepted by the Treasury. Thus civil servants have, in fact, though not in law, a very secure tenure.

The older books on constitutional law often gave the impression, which was accentuated by the use of the term executive, that the work of government departments was limited to seeing that the law was obeyed to the letter and in the spirit. It was not their function but that of the courts to interpret the law, and they had





### THE PUBLIC LIBRARY

Among the cultural facilities offered by local government is the public library. An Act permitting the opening of public libraries was passed in 1850, and then establishment was given impetus by the Carnegie Trust Fund which provided money for both buildings and books.

little or no discretion as to what they had to do. Of course, no one really believed that this was true of the work done in the Foreign Office or the Service Departments, but it was generally credited to the departments which came into contact with local authorities or the ordinary citizen in his civil capacity. But in actual fact no government department is ever an automatic machine. Of course, the majority of the officials employed in them have very little discretion, no more than a clerk in an ordinary business. They have their work clearly mapped out for them and their task is to do it as efficiently as possible, and they do not often come into official contact with persons outside the department. But executive officers, especially the higher among them, are bound to exercise a good deal of discretion. They work within a framework of general instructions contained in statutes, regulations or orders, but they have to apply these to the particular facts of cases that come before them and for that purpose to interpret them just as much as any judge, though, of course, their interpretations and applications are not final but can be called in question.

#### The Administrative Grade

In the administrative grade the discretionary element becomes predominant. All administrative officers, from the Permanent Secretary of a department down to the Assistant Principal who has just entered the service, spend most of their time on questions of policy. The work done by this comparatively small body of officials—there were about 1,200 of them in the years immediately before the war—is so important and generally so little understood, that it deserves extended treatment.

It must first be emphasized that they are strictly subordinated to the Minister who is the political head of the department. They must obey all his lawful orders, even if they disagree with them, and they must give him fairly and candidly, not only all the information he requires to enable him to make a decision, but also all the relevant arguments *pro* and *con*, not concealing their own opinions, but helping him in every possible way. And if, after obtaining their advice

their Minister decides against it, they must carry out his decision in the best way possible. A quotation from Sir Austen Chamberlain's *Down the Years* (p. 310) is illuminating. Of Sir George Murray, long the permanent head of the Post Office, he writes: 'He was raciest in conversation as when, having failed to persuade me that something I proposed to do was inexpedient, he asked: "Well, if you must do a silly thing like that, is it necessary that you should do it in such a d—silly way?" and proceeded to indicate a much better method of carrying out my idea.'

None the less, since the line between administration and policy cannot be drawn with any certainty, civil servants of the administrative grade cannot help being politicians. Party politics are certainly outside the sphere of the permanent official but there is much in politics that is either not to be found in the programme of any party or common to all.

From this kind of politics a civil servant cannot keep himself free, even if he would and in making decisions he will always have due regard to public opinion.

A large government department will normally have, in descending order, officers of the following ranks: Permanent Secretary, Deputy Secretary, Under Secretary, Assistant Secretary, Principal and Assistant Principal, the last type being really a cadet, who is being trained by one of the Principals whilst assisting him with his work. Each group of Principals will have a number of clerical officers preparing work or collecting materials of a statistical or similar character. Some departments, such as the Revenue departments, are mainly staffed by executive officers.

#### Relations with the World at Large

Much of a department's work is stimulated from outside. Letters come in from local authorities and private persons and companies. They are either addressed to or are sorted out and transmitted to, the branches of the Ministry which deal with the subjects to which they relate. There each is read by a clerical officer of the branch, who will find the file dealing with the subject together with any other papers

which may have a bearing on it. All this he will place before an administrative officer, normally a Principal, who studies the case and, if necessary, starts an investigation in pursuit of the answer, consulting, at need, other government departments or local authorities or private interests concerned.

If, however, the Principal feels uncertain as to his proper course of action or his authority to pursue it, or if he wishes to propose something of a far-reaching character, he will have to put up the case to his senior officer, an Assistant Secretary, stating what he thinks ought to be done, and why. If the Assistant Secretary knows that he can settle the matter on his own responsibility, he will minute the file back to the Principal with instructions for action, but if not, he will minute it to his superior officer, an Under-Secretary, and so on. Cases raising important questions of politics, or requiring a definition of policy where none has yet been attempted, will usually move rapidly up to the Minister himself, and so will those likely to entail administrative changes.

#### Work of Administrative Officer

For the administrative officer, what he does with each problem is a matter of tact, knowledge and judgment: an administrative officer will make decisions, either at once or after consultation with specialists, on all matters referred to him for action which he knows to come within the scope of his responsibilities, thus relieving from comparatively detailed work the officers of higher status. An experienced Principal or Assistant Secretary must therefore know the mind or policy of his Minister and of the department. He can never forget that whatever is done by himself as a departmental official is held to be the act of the Minister—even if the Minister has never heard of it and even if it has been done by the officer without reference to higher authority. When he writes a letter, he writes in the name of the department and begins in the conventionalized mode "I am directed by the Minister of Such-and-Such to acknowledge your letter and to say, etc.", a manner of speech which,

though conveying to the literal minded a suggestion of falsehood, usefully expresses the fundamental responsibility of the Minister for everything that is done in or issues from his department.

What are the queries which are commonly addressed to Ministers?

Since men's interests are diverse, it is impossible for any ministerial policy to satisfy equally all those affected by the policy. This unequal satisfaction (sometimes dissatisfaction) is expressed in letters to the department. Such letters may come from individual citizens, or from shopkeepers or businesses, or from associations of employers or of professional men, or from trade unions, etc. They may offer reasons why a particular policy should be modified, or claim redress on the grounds that the execution of a particular policy is unjust to them in failing to take account of certain factors peculiar to their position. The raising of the questions and the answers to them are usually envisaged by the department when policy is being framed. But not infrequently new points emerge and these must be considered on their merits so that injustices shall, if humanly possible, be eliminated.

It is here that a mistake made in the name of the Minister may be of very considerable consequence to the country, for a government department, unlike a business company, is not in a position to say No to one customer and Yes to another. Fairness demands that whatever is conceded to one must be conceded to all in similar cases. Perhaps the characteristic caution of civil servants—which can be so maddening to the outside world—is due not a little to their knowledge that an incorrect reply which may save a thousand pounds (at Government expense) to the firm inquiring may, within a week or two, mean a thousand firms very properly seeking a like reply to the same inquiry.

#### Creating New Services

Occasionally it is given to a department to create a whole new service or to develop an old service beyond recognition. The impulse may, and indeed usually does, come from outside, from some social inves-

igator or party politician or programme. If a big scheme is proposed however, it is necessary, in order to carry it out, to capture either the Minister at the head of a department or the principal officials in it, for only a Government department has the required information or the personnel to use it.

How that information is acquired has already been suggested. In one of its aspects a department is a library of returns and files, carefully registered, so that they can be traced with reasonable quickness. It is also, of its very nature, a great research institution, for nothing is done in the ordinary course of business without a careful inquiry into the history of the case or topic. Moreover, it is almost certain that some thought will have been given to every foreseeable contingency likely to require a new scheme of action and opinions, both administrative and technical in relation to all proposed schemes, will be on record in the Ministry's files.

#### Advice and Consultation

Suppose, then, that a Minister has been convinced that a scheme should be seriously considered. The first thing is for him to talk to the Permanent Secretary to see if there is the necessary organization in the department. If there is, the head of the division or branch will be brought into consultation and receive his instructions to work out the details of the scheme. Eventually everything is integrated after consultations between the Minister, his higher and lower officials and almost certainly, other departments, including the Treasury. The departmental lawyers will have advised how to fit the scheme into the existing framework of the law. At this stage, or earlier, the department will consult interests likely to be affected by the scheme. If it concerns local government, the great associations such as the Association of Municipal Corporations or the County Councils Association will be called into consultation together with some Town Clerks or other local officials whose opinion is highly regarded. If it impinges on labour relations the department will get into touch with the officials at Transport House, the headquarters of the Trades

Union Congress, or with the Federation of British Industries, or some other trade association. Questions relating to police will be discussed with the Police Council and the Police Federation, both of them statutory bodies and the Ministry of Agriculture has Councils of Agriculture and an Agricultural Advisory Committee for England and Wales. The tendency to use such statutory advisory bodies of a representative character has increased greatly in recent years.

When all consents have been obtained, or it has been decided to dispense with them, the scheme will, unless it can be carried out under the department's existing powers, pass into the stage of proposals for a bill which upon general approval by the Home Affairs Committee of the Cabinet will be sent to the Parliamentary Counsel to the Treasury to be drafted as a bill to be laid before Parliament. It will then be mainly the concern of the Minister in charge of it, but permanent officials will have to be in attendance both in the "box" of the House and before committees to assist him with information and advice.

#### Making a New Act Work

Assume now that the bill has become an Act of Parliament. It will not work of itself. The Act will contain only the main outlines of the scheme, sufficient to make clear the policy behind it, together with such safeguards for individuals, special interests and the public at large as the Government or Parliament have thought fit to insert in it. It will in many cases be more akin to a constitution than to an act of detailed legislation. The details will have to be filled in either by regulations, rules or orders which the department is empowered by the Act to make or by the administrative acts of the department and, it may be, of local authorities which have to put it into effect, or by a combination of all three. Thus the department will probably, concurrently with its preparation of the bill, have been working out regulations and other acts of subordinate legislation, and shortly after the bill becomes law will issue them in a form drafted by its own lawyers.

Care must be taken to see that this subordinate legislation is properly covered by the powers given by Parliament, otherwise it may be attacked in the courts, which will treat it as invalid on the ground that it is *ultra vires*. But Parliament may itself insist on exercising control by enacting that a rule or regulation shall take effect only if approved by an affirmative resolution of both Houses, or shall cease to have effect if disapproved by a negative resolution.

It had long been a sore point that, in fact, members rarely had any knowledge of the contents of subordinate legislation and so parliamentary control was a nullity. However, in 1944, a Committee of the House of Commons was set up to consider certain types of subordinate legislation and decide whether the special attention of the House should be drawn to it as containing unusual features which might not commend themselves to the House, and the committee can call upon departmental officials to appear before it and give explanations. Even if subordinate legislation is not made subject to affirmative or negative resolutions, any member may ask a question of a Minister about it and, if necessary, move the adjournment to discuss it.

#### Local Administration

Local authorities and public utility undertakings generally have power to make by-laws, and these by-laws, though they can be attacked in the courts on the ground that they are *ultra vires* or merely unreasonable, are not subject to direct parliamentary control. On the other hand, they always require the consent of some government department, and indeed government departments are in the habit of issuing model by-laws which they recommend such authorities and undertakings to adopt. Any by-law not contained in such model by-laws is carefully scrutinized before approval by the department.

However, the control of a central department over the local authorities administering a service extends far beyond legislation. The department is entrusted with the important duty of ensuring that the actual administration shall conform to reasonable standards of efficiency, and for this pur-

pose it is regularly given certain powers.

Thus although local authorities appoint their own officers, the appointment of some, of the most important, in particular the chief constable, the medical officer of health, the chief sanitary officer and the director of education is subject to the approval of the appropriate central department and in some cases officers can be dismissed only with a like approval, or subject to appeal to a department. In this way many local heads of services have acquired a very salutary independence of their local councils.

Further in many cases if a local authority neglects to perform its duty, a department may step in and perform it itself, charging the cost to the local authority, and in extreme cases of neglect local authorities have been superseded for the time being—though this is a dangerous power to exercise since it is apt to have political repercussions.

#### Control by Audit

The central authority's main methods of control over local authorities are, however, financial. The first is audit. The audit of borough accounts is performed by locally elected auditors, who have power only to certify that the accounts are correct or to call attention to irregularities. On the other hand, the audit of other accounts (including the education and housing accounts of boroughs) is performed by Ministry of Health officials known as district auditors, who have power to disallow illegal payments and surcharge them on the persons authorizing them. An alderman or councillor thus surcharged is placed under a legal obligation to refund his share of the money illegally paid, and in certain cases is disqualified for five years from being a member of any local authority. But he may appeal from the district auditor's decision either to the High Court or, if the surcharge is for £500 or less to the Minister of Health and he may be relieved if, although the payment was illegal, the court or Minister is satisfied that he acted reasonably or in the belief that his action was authorized by law. This form of control, it will be observed, is in respect only of legality, and does not



#### CITY ENGINEER IN HIS OFFICE

*Local authorities have their own staffs of executive officials for housing, hospital and health services, libraries, roads and transport, police, etc. Here a city engineer refers to a huge map of the city he serves during a discussion on replanning*

relate to policy or standards of administration like the form now to be described.

#### Financing Local Authorities

Local authorities finance their non-remunerative services in the first instance out of rates levied on the occupiers of premises. But exclusive dependence on rates would make the provision of services such as public health, education and housing ruinously expensive to poor authorities, which are precisely those most in need of

them. Accordingly, over a long period of years a system of grants in aid has been developed, under which payments are made out of the national exchequer to local authorities. Some grants in aid proceed on the principle of paying half the cost of a service: such are police and education grants; and they are made only if, as a result of inspection or otherwise, the appropriate central department is satisfied that the service is reasonably efficient. But most other grants are now superseded

by an Exchequer Equalization grant which is divided among counties and county boroughs in such a way as to compensate poor areas for their low rateable value. If the Ministry of Health is not satisfied as to the efficiency and progress of a local authority's services, it can reduce the grant, but must lay a report of its action before Parliament.

Now these sanctions, though real, are obviously to be used only in extreme cases, and if a local authority is determined to underspend on a service, a refusal on the part of a department to pay grants in aid may even play into its hands. However, this is unlikely to occur. Local authorities wish to earn their grants and do their best to satisfy the departments' inspectors. Thus the practice of making grants in aid gives the central departments great influence over local authorities and leads the latter to consult them whenever they are in difficulties or, alternatively, when they wish to extend any one of their services or make new schemes.

#### Loans and the Ministry

Indeed, the general knowledge of an authority's financial and administrative efficiency which a department obtains, largely through the practice of making grants in aid, becomes peculiarly valuable when a local authority wishes to raise a loan. Loans always require the approval of the Ministry of Health, though that department will accept the opinion of some other department as to questions of policy where the loan is for some service supervised by that department and not by itself. But where Ministry of Health services are concerned, the Ministry can always suggest that some other service should have priority over that for which the local authority proposes to raise the loan, and it is well known that a local authority noted for its general efficiency and progressiveness finds it easier to obtain the Ministry's consent than one noted for the opposite qualities.

Finally, central departments have in some instances a jurisdiction to hear appeals from the decisions of local authorities. The traditional English view

is that a person shall not have his property rights interfered with, otherwise than by national or local taxation, except in consequence of a judicial decision arrived at after a hearing in open court by one of the ordinary courts of law. It has, however, been found impossible to maintain this principle in its entirety. To give only one example, at Common Law the owner of a building can use it as a shop if he likes.

Now it has been found necessary in the interests of rational town planning to impose restrictions on the opening of shops in certain neighbourhoods, and it has not always been thought advisable to make these restrictions hard and fast, a local authority has had to be given a discretionary power to waive them in proper cases. In this and similar instances, however, a person aggrieved by the local authority's decision is given a right of appeal to the government department entrusted with the supervision of the service. It is felt that there must be some appeal in case the local authority takes a wrong view of the policy intended to be enforced, and it is also clear that an ordinary court of law is not in a position to give an opinion on what is, after all, a question of policy and not of law.

From all this it might appear that the central government departments exert an iron control over local authorities, and that the latter are mere instruments in their hands to carry out policies laid down at the centre. But this is not so. In the first place great legislative monuments like the Public Health Acts have not proceeded from the heads of Ministers or high departmental officials but from the local authorities themselves. They are for the most part composed of provisions contained in private Acts of Parliament promoted by progressive local authorities. When such provisions have become common form, in the sense that all progressive authorities insert them in their private bills and Parliament accepts them as a matter of course, it is time to incorporate them in a general Act, which will apply to all local authorities of a particular class whether they want them or not.

Thus the regular process of development is that some local authority experi-



#### MOTHERS AND BABIES

*Social services, devoted to the well being of the individual citizen are directed by all local governments. These include clinics where mothers and young children receive free medical advice and treatment. By such means babies are given a healthy start in life.*

ments with a device other progressive authorities follow suit and finally a central department imposes it upon authorities which are too sluggish or too parsimonious to desire the trouble or expense of operating it. The department tries to enforce a reasonable standard throughout the country, while allowing the best authorities to run ahead of it.

But nowadays a progressive authority will not try out a new scheme without consulting the appropriate central department, which has, of course, greater experience and wider sources of information. To an over-

whelming degree the relation between local authorities and central departments is one of mutual trust and confidence. The latter are not anxious to catch out the former, but rather to help them do their job, nor are local authorities any more anxious than ordinary citizens to court rebuffs.

Rather than have their nominees turned down, they prefer to ask the department beforehand whether the candidates on their short list are acceptable for the office which they have to fill. Indeed, the main advantage that a central department derives from its various legal methods of control is to





COUNCIL HOUSING ESTATES



AMBULANCE AND POLICE SERVICES



HEALTH SERVICES

### HOW YOUR RATES ARE SPENT

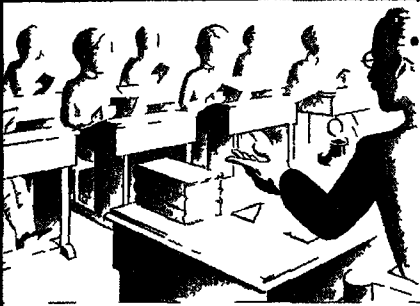
*Rates are those monies levied by a local authority for expenditure on local amenities and services; they are often supplemented by loans or national grants in aid*



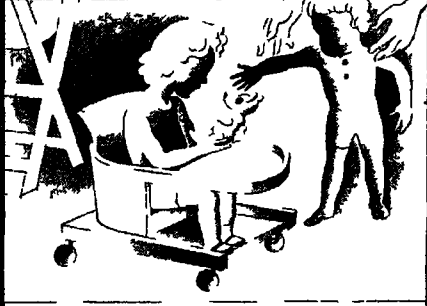
SWIMMING BATHS



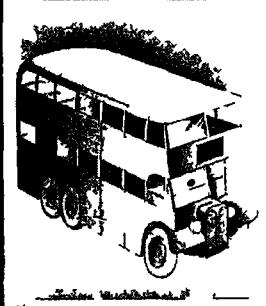
PARKS AND RECREATION GROUNDS



SCHOOLS AND INSTITUTES



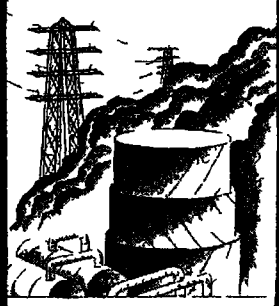
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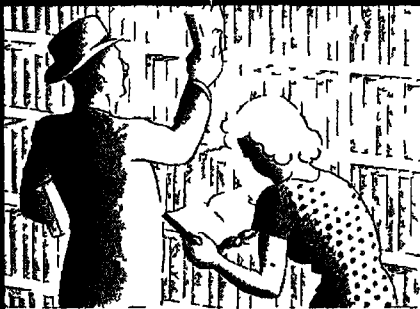
TRANSPORT SERVICES



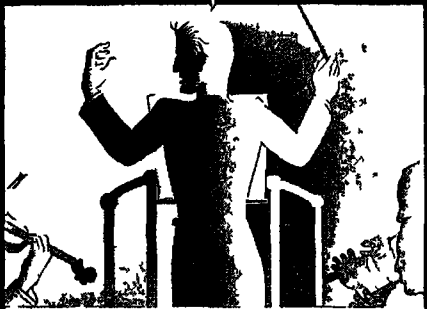
ROAD MAINTENANCE



GAS ELECTRICITY  
AND WATER



LIBRARIES AND MUSEUMS



CONCERTS AND ART GALLERIES

*Leslie S. Haywood*



MEDICAL OFFICER OF HEALTH AT WORK

*Child welfare is one of the most important social services in the nation's effort to produce healthy people. Regular medical and dental attention can be had at the clinic and at school.*

make local authorities willing to consult it when they meet with difficulties in administration, or willing to accede to reasonable requests, compliance with which the central department would be unable to insist upon. In the same way the task of an inspector is less to find material for censure or prosecution than to persuade operators to improve their standards and to show them how to do it. It cannot be too strongly emphasized that in Great Britain more can be done and is done by request and informal consultation than by actual command.

This system is not federalism in any strict sense of the term, for local authorities owe their constitution to Parliament, they can act only by virtue of powers conferred on them by Parliament, their areas can be altered by Parliament, and indeed the whole system of local government, and especially its financial arrangements, can be overhauled and reorganized by Parliament. Yet it does seem to have become an essen-

tial part of the British Constitution that there shall be a wide sphere of internal government in which policy shall be determined and carried out by the co-operative efforts of a central government responsible to the nation as a whole and by local authorities responsible to the local electors and that in matters of local administration including the settlement of lesser questions of policy which are inseparable from administration, local authorities shall have a reasonably free hand.

If, then, we are willing to admit that a constitution in which the guarantees and sanctions for existing arrangements and for orderly changes in those arrangements are political, not legal, is none the less a constitution, we must also admit that there is an element of federalism in the British Constitution. But the federalism is of a peculiar kind, and it would seem, an advanced kind, to which, after a long period of standoffishness between federal and state organs, both

American and still more Australian federalism are fast approaching, a federalism which is no longer characterized by a rigid demarcation of the spheres in which federal and state agencies operate, but by a co-operation between both in a single system of administration, in which the federal government is able to assert a certain leadership by virtue of its superior financial power.

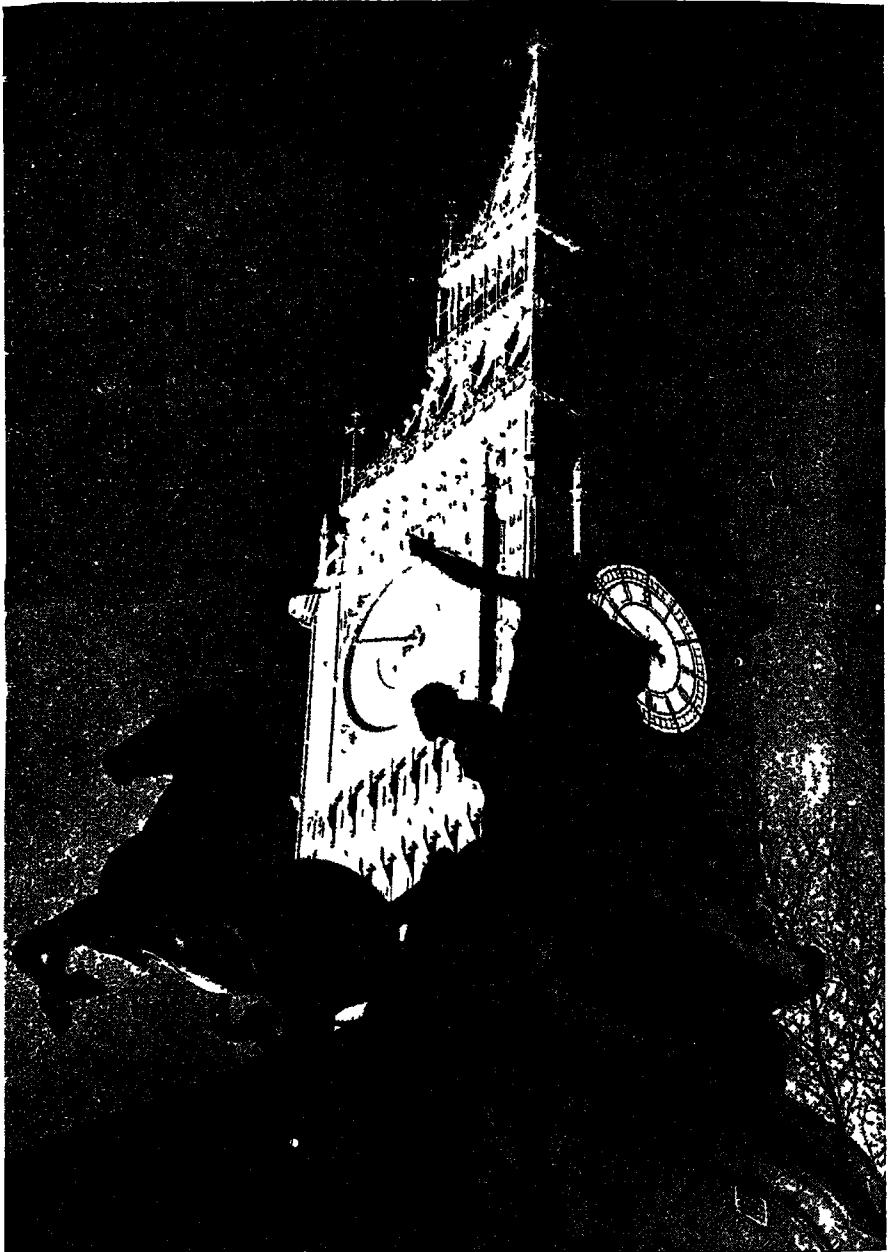
There is, however, a certain field, even in British internal government, where the central government acts directly on the ordinary citizen and makes only slight use, if any, of local authorities. The Ministry of Labour has its labour exchanges all over the country which are staffed exclusively by civil servants, and it administers unemployment insurance without reference to local authorities. Similarly, it sets up its own Wages Councils for industries which cannot be effectively organized on a trade union basis and it intervenes directly to settle strikes. The Ministry of National

Insurance likewise administers health insurance, widows', orphans' and old-age pensions, unemployment assistance and workmen's compensation without reference to local authorities and entirely through its own officials. All these services have been instituted within the last fifty years, and it was clear that their administration must be on a national basis. Unlike public health, for example, they had no background of private Acts of Parliament promoted by local authorities, and in addition they could be financed only on a national scale. Finally, there was little room for the decentralization of policy-making in matters of detail which is one of the justifications for local government of the British type. Such decentralization as there must be in the operation of such gigantic schemes is mainly judicial, the decision of individual cases in accordance with uniform rules, and there is always an appeal in the most important cases to a central authority.

### Test Yourself

1. What is the "Consolidated Fund," and who originated it?
2. What official is responsible for seeing that only monies authorized by Parliament are drawn from the Consolidated Fund?
3. What is the "royal prerogative," and how is it exercised today?
4. Why does Parliament pass an Army and Air Force Act every year?
5. What special historical reason explains the large measure of independence in local authorities which is characteristic of English government?
6. How is the country divided for the purposes of local government?
7. How are (a) councillors, (b) aldermen, elected?
8. What means of control has the central government over the conduct of local authorities?
9. Why cannot a government department be "run on business lines"?
10. How are by-laws made?

*Answers will be found at the end of the book*



#### GUARDIANS OF LIBERTY

*Boadicea, a British tribal queen, who defied the tyranny of the Romans, is silhouetted against the tower of Big Ben, symbol of British Parliamentary liberty.*

# BRITISH LAW AND GOVERNMENT: THE SAFEGUARDS OF LIBERTY

FOR centuries England has been known, not only to her own citizens, but also to foreigners, as a land of liberty. Montesquieu indeed, writing in 1748, looked upon the attainment and securing of liberty as the prime object of the English Constitution. But although the English people have long pursued liberty and have attained it in an altogether exceptional degree, it is not easy to give precision to the idea or to the peculiarly English way of conceiving it.

One misconception must be set aside at once: liberty does not mean the mere absence of constraint. Otherwise the fittest of men would be the hermit and the tyrant, but the former acquires his freedom from constraint only at the cost of relinquishing the fulness of life, the latter only by subjecting others to his unregulated caprice. For civilized men liberty is to be attained only in an ordered society, a society which cannot exist unless its members are prepared to submit themselves in some measure to rules. This is what the great German philosopher, Kant, meant when he said that law exists for the purpose of liberty.

From such a standpoint as this, liberty is that relation of a citizen to his fellow citizens which enables all to develop their personalities in the highest possible degree. Fundamental to it is an acute sense of responsibility in the ordinary man, and absence of constraint is as important because it gives the necessary field for responsible action as because it is itself a partial expression of liberty. A regime of liberty makes much greater demands on the ordinary citizen than an authoritarian government.

Now liberty in Britain has always implied its converse, responsibility. Thus the right of personal freedom does not mean that a citizen may do as he likes without fear of being thrown into prison. He may

very well have to serve a long term if he acts unsocially. But he will be imprisoned only after a public inquiry by a court of justice into his responsibility for the wrong committed and the standard according to which his responsibility will be measured is one laid down by law and not by the arbitrary will of a superior or of one or more of his fellow-citizens. This is the root idea of the famous principle to which Dicey, the English jurist, gave the name "The Rule of Law", and this Rule of Law has been pursued with much greater fidelity and sense of principle than any of the specific freedoms for these, as we shall see, have been discovered and secured piecemeal and by a process of trial and error.

## Rule of Law

The Rule of Law is one of the oldest things in England, and indeed it was the basis of medieval life throughout Western and Central Europe. The peculiarity of English development is that, though it was in constant danger of being submerged during the sixteenth and seventeenth centuries, it never gave way, as in most of the states on the Continent, to the opposing doctrine, *reason of state*. Among many reasons for its survival a prominent place must be found for the circumstance that as early as the reign of Henry II trial by jury had been incorporated as one of the most vital elements in a tough and well-organized system of royal justice, and that, as we have already seen, it was precisely through justice that the royal power made itself felt throughout the length and breadth of the land. By the beginning of the thirteenth century it had become normal to test all important issues of fact by the sworn testimony of free men of the neighbourhood, and Magna Carta in its famous Thirty-ninth Chapter provided that

"No free man shall be imprisoned or

dispossessed or outlawed, nor will we go upon him nor will we pass upon him except by the lawful judgment of his peers or the law of the land."

Although modern scholars are doubtless right in refusing to see in the chapter a direct reference to trial by jury, it undoubtedly utters a protest, never completely silenced against arbitrary imprisonment or deprivation of property, and may be considered the first clear expression of the Rule of Law, and, all things considered, later ages did not go far wrong in associating it with trial by jury or in regarding the latter as a main safeguard of liberty.

#### Judges and Juries

A description of the judicial system will be found elsewhere in this book. Here it is only necessary to call attention to a few features which are peculiarly conducive to liberty. Not only are professional judges and magistrates and unpaid justices of the peace entirely free from control by the government, but the verdict of a jury in favour of the accused cannot be reviewed at the instance of the prosecution. Thus juries are able to temper justice with mercy and to refuse to convict wherever the law is seriously out of touch with public opinion. The power of adjusting the law of the land to difficult cases, which is indispensable to every humane and enlightened system of justice, is in this country vested, not in officers appointed and under the control of government, but in chance groups of citizens who, as Montesquieu observed, are taken on each occasion from the general mass of the people and retire after doing their duty into the obscurity from which they came.

On several occasions in the past, juries have struck vigorous and effectual blows for the liberty of the subject when the law has, for the time at least, been illiberal. Although the justices of the peace have not played so distinguished a part, and have indeed at times in the past been tyrannical, they, too, help to ensure that the law shall not long remain out of touch with public opinion.

Moreover, the police are always in very close touch with the courts and stand

somewhat aloof from the executive government. In the counties this is most evident, for the body responsible for the administration of a county constabulary is a Standing Joint Committee, appointed as to half by the County Council and as to the other half by the Justices in Quarter Sessions, but everywhere the police will not help central or local government authorities unless their aid is necessary to enforce the law. They are the servants of the law and of nothing else. They have nothing to do with the kind of policy that is associated with politics or administration. But like juries, they exercise a certain discretion in the enforcement of the law, turning the blind eye to offences which, whether because they are intrinsically unimportant or because they are unlikely to be repeated or because public opinion would be averse to prosecution, they think it inadvisable to make a case about.

#### Tradition and Obedience

Thus one may say that the whole administration of justice, of law and order, as it is often called, is kept out of politics and responsiveness to public opinion is ensured not, as in the provision of most other services, by periodical popular elections, but by settled tradition and by the more automatic and instinctive operations of policemen, juries, and unpaid justices of the peace.

Of course, the services which are directly provided by central and local authorities commonly entail an element of enforcement. Orders have to be given and persons who refuse to play their part have to be punished. In so far as those engaged in the service are subordinates of central and local authorities they are, of course, subject to discipline, which can be enforced in the usual way by threats of dismissal or stoppage of pay. But where the co-operation of the general public is needed the only means available in this country are to make co-operation a statutory requirement so that non-co-operation becomes an offence, and since it has long been very rare for the government to use the army in order to enforce its will within the realm the police are the only body available which

has actual physical power to compel obedience. But they, as we have seen, regard themselves as the servants, not of the government or of the local authorities by which they are administered, but of the law. Indeed, recent studies on the early history of the Metropolitan Police show that it was only by making this attitude known to the public that the early distrust of the force was overcome.

#### Protection of Habeas Corpus

It has for centuries been one of the most treasured British ideals that the government should never be able to put arbitrary pressure on the individual citizen, but should always have to obtain sanction for its commands by procuring their embodiment in Acts of Parliament, and should only be able to enforce them through the ordinary courts, and not by using extraordinary tribunals such as the Star Chamber used to be. But as we have seen, the business of government is today so complicated that it is no longer possible to embody all such commands in Acts of Parliament, although it is still the practice to issue commands in general legislative form, even when they are issued by government departments under the authority of Parliament. Thus there has been little diminution of the principle that what the ordinary citizen obeys is, not the commands of the government, but the law.

This is important, for experience seems to show that the chief weapon of tyrannical governments is not the issuing of oppressive commands, but the power of interning their enemies without legal process, or halting them before secret tribunals executing an arbitrary justice unknown to the ordinary law. And it is significant that for Englishmen the most objectionable features of the Nazi despotism were not the Nuremberg decrees—though they were bad enough—but the concentration camps and the operations of the Gestapo and the People's Courts. Against evils such as these the English have developed an effective safeguard in the writ of Habeas Corpus.

Habeas Corpus is at least seven hundred years old, but the rules relating to it have been made more stringent by statutes of

the seventeenth century and later which are often supposed to be its origin. However, habeas corpus is much older than the Habeas Corpus Acts. It is a writ by which any judge of the High Court may, and, in a proper case, must, order anyone who has another person in his custody to produce the latter's body, together with the reason for his detention.

If the reason is found to be a good one in other words, if the detention is lawful, as for instance, if the prisoner has been sentenced to imprisonment by a court of competent jurisdiction, the prisoner is remanded to prison. If, on the other hand, the prisoner is awaiting trial, the court may decide to release him on bail. Finally, if the court finds no lawful reason for his detention, the prisoner is set at liberty. The effect has been, at any time since the Habeas Corpus Act of 1679, to make it impossible for the government or anyone else to detain anyone without the authority of law for more than a very short time.

At one time it was the practice in periods of emergency to pass Acts of Parliament suspending the issue of the writ of habeas corpus. In the two World Wars, however, it was thought better not to take this course, but to empower the government to intern suspected persons without trial, though special committees were set up by the Home Secretary to consider cases of persons so detained and advise him whether or not he ought to release them. Such cases are, however, now exceptional, and it is noteworthy that provisions such as Regulation 18B, which gave the government these powers during the Second World War, were among the first emergency provisions to be abolished as soon as the emergency had ended.

The other side to the Rule of Law is the possibility which it affords the ordinary citizen of reacting against interferences with his rights by any other person even though he is a government servant.

The law on this topic, formerly imperfect, has been greatly improved by the Crown Proceedings Act 1947, which makes the Crown liable to action like any ordinary person, and reduces to a minimum its privileges in litigation.



THE  
 Peoples {Ancient?  
 and Just} Liberties  
 ASSERTED,  
 IN THE  
 TRYAL  
 OF

*William Penn, and William Mead,*

**At the Sessions held at the Old-Baily in London, the  
 first, third, fourth and fifth of Sept. 70. against  
 the most Arbitrary procedure of that Court.**

PAMPHLET CELEBRATING JURY'S INDEPENDENCE

*A milestone in the history of trial by jury was the occasion on which William Penn and William Mead, Quakers, were found not guilty on a charge of preaching to an unlawful assembly in 1670. The jury refused to reverse their verdict, and for this were imprisoned.*

*A hearing of the jury's case before twelve judges upheld their stand.*

While, however, it is right to see in the Rule of Law the essential foundation of English liberty, it must be admitted that in itself it is not inconsistent with severe restrictions on freedom of action. True it is that the government in England must always point to specific legal powers impinging upon a general freedom of the subject; but this may mean little if the powers of the government are sufficiently wide. And they are very wide nowadays and the liberty of the subject is sometimes surprisingly narrow. Thus the restrictions placed in the way of consuming intoxicating liquor are such as would cause a revolution in many countries. Moreover, in respect of public meetings and processions the powers

of the police are so extensive that it has been said with some truth that one of the reasons why Britain has the reputation of being one of the freest of all countries is that the police force does not use all the powers it possesses.

**Growth of Civil Liberties**

In Britain great freedom is undoubtedly enjoyed, however, and succeeding generations stretch forward to freedoms which earlier generations hardly conceived of. Liberty may be classified under three heads, civil, political, and economic. By the end of the seventeenth century, a good start had been made on the most important civil liberties. Not only had the procedure in

Habeas Corpus been perfected in criminal cases, but religious toleration, as yet incomplete, had been accorded to all Protestant Dissenters, and, above all, the censorship of the Press had been abolished when the Licensing Act was allowed to lapse in 1695.

All these liberties needed to be secured and confirmed in the course of the eighteenth and nineteenth centuries, but, except during the reactionary period of the Revolutionary and Napoleonic Wars, there has been no retrograde step; for the suspensions during the two World Wars were by general consent intended to be temporary, and were cancelled immediately on the return of peace. Thus, although the Toleration Act of 1689 did not allow Protestant Dissenters to hold office under the Crown or as members of municipal corporations, they very commonly did serve in such positions, and from 1727 onwards were regularly protected from liability for their illegal conduct by annual Indemnity Acts passed by Parliament. Finally, in 1828, the Test and Corporation Acts, which had excluded them from office, were repealed. Similarly, in 1829, the Catholic Emancipation Act removed from Roman Catholics in Britain all but a few trifling disabilities.

#### Freedom of Church and Press

In England, though not in Wales or Northern Ireland, the Anglican Church remains established and retains its ancient endowments, but this is hardly a privilege since the establishment of the Church of England, in contrast to the establishment of the Presbyterian Church in Scotland, subjects the Church in some measure to State control, and the financial condition of the Church is now so precarious that disendowment could hardly be contemplated except by an extremely anti-clerical government. It will, however, be noted that religious liberty shades off into religious equality, and we shall see later that the distinction between liberty and equality, so dear to the older writers on the constitution, now wears very thin.

The freedom of the Press likewise has taken many years to complete. For although since 1695 there has never been a

censorship except in time of acute national emergency, measures were taken, by imposing stamp duties, to keep newspapers expensive and so to restrict their circulation to the wealthier classes. Only in 1860 were the Paper Duties abolished and really cheap journalism made possible. But the Press, and indeed all expression of opinion, though free, is responsible, for defamatory statements may lead to a civil action for libel or slander on the part of the person defamed or even, in special cases, to a prosecution for criminal libel; and prosecutions are still instituted, though rarely, for blasphemy, obscenity or sedition. Indeed, the effect of a decision of the House of Lords in 1910 has been to make the law of libel a dangerous instrument for blackmailing a newspaper which may have inadvertently published some trifling libel, and an amendment of the law which will protect the newspapers without depriving defamed persons of necessary redress is very desirable.

Awkward and expensive as the present abuses may sometimes be, they do not unduly restrict freedom of expression. Indeed—and this is very odd—even in the sixteenth and seventeenth centuries, when a censorship existed, English literature bears none of the marks of a repressive regime. If a person felt himself really bound to write and print anything, he seems to have succeeded in making his views known.

#### Public Meetings

The task of expressing one's views orally to masses of people gave and still gives rise to other problems. The law does not recognize any general right of public meeting, but, on the other hand, neither the government nor local authorities have a general right to prevent or break up meetings of which they disapprove. Formerly, however, before the days of organized police forces, meetings were apt to end in riots, causing damage to property and loss of life, and so the common law distinguished three offences: riot, when three or more persons meet together to carry out an unlawful purpose or a lawful purpose by unlawful means and actually use violence;

## LIBERTY IN ENGLAND

*English liberties were hardly won over the centuries, and only in due extremity is it possible that any would be sacrificed*

riot, when they have merely moved off towards the place where they intend to operate; and unlawful assembly, which in one sense means an assembly which will, unless stopped, end in riot and riot, and in another sense means any concourse of people which is likely to strike fear into the heart of a man of ordinary firmness

## Riot Act

All three offences were punishable by fine or imprisonment. But in 1714, Parliament made an addition to the law which is often misunderstood. The Riot Act of that year enacted that, if twelve or more persons continued assembled for an hour or more after a magistrate had read a proclamation (the terms of which are given in the Act) requiring them to disperse, they became felons, and felony was then punishable by death.

After the passing of the Act the notion spread that until the hour was up neither magistrates nor troops could fire on rioters, but that afterwards they had liberty to do so. That, however, is not the law. Every magistrate is under a duty to do all that in him lies to suppress riots and to call on everyone else to help him, soldiers and civilians alike; and if he deems it necessary he must order troops to fire on rioters whether or not the hour specified in the Riot Act has elapsed, and even, in a proper case, without "reading the Riot Act." On the other hand he must be prepared to answer afterwards to a judge and jury for his acts.

Similarly, a magistrate is entitled to bind over to keep the peace anyone whom he has reason to believe to be about to incite or start a breach of the peace, and he can break up any meeting which comes within the definition of an unlawful assembly. We may even go further and say that any police officer may take all steps which are reasonably necessary to prevent a breach of the peace, and anyone who obstructs him



while so doing—which includes merely refusing to move on when called upon to do so—is liable under the Prevention of Crime Acts. But it must be observed that in all this magistrates and police are limited by the necessity of the case. They must not forbid a meeting merely because they think there may be a little trouble, certainly not because it will be more trouble to themselves to provide a moderate amount of police protection than to prevent the meeting from taking place.

Today, the main obstacles to the free holding of public meetings are to be found in the law of trespass and nuisance. The law of trespass places it in the power of any



possessor of land to forbid the use of it by anyone else for any purpose. If it is a highway, he cannot prevent persons using it for the simple purpose of passing and repassing upon their lawful business, but he is entitled to say that even a highway on his land shall not be used for a public meeting. Moreover, in an urban area the local authority is the owner of the surface of highways, and so can forbid the holding of any meeting in its streets, even though the reason has nothing to do with obstruction of traffic.

In any case, obstruction of traffic constitutes a nuisance at common law. Not only can obstructors be prosecuted or have

civil actions brought against them, but they can be dispersed by the police. Stationary meetings in busy streets almost inevitably constitute nuisances and are almost automatically stopped by the police unless it is known beforehand that they will be of short duration and are for a non-controversial purpose. But, oddly enough, processions, unless they move very slowly and attempt to pass through streets where there is an exceptional volume of traffic, are not necessarily held to be nuisances. So, too, those taking part in them are merely passing along the highway and are not necessarily trespassers.

However, it has for some time been the

practice of those who wish to hold outdoor meetings or processions to apply first to the police, who are in the habit of suggesting places for meetings or routes for processions, on the understanding that if the promoters accept and adhere to the suggestions, they will not only be free from interruption or prosecution by the police, but may also have a certain amount of protection. On the other hand, if the promoters try to be awkward and force their way through busy thoroughfares they may be in trouble. The Strand at midday is not a proper place for a public meeting or a procession, but the police will not interfere with you if you stand on a soapbox in Hyde Park or in Lincoln's Inn Fields.

#### Right of Assembly

The Public Order Act, 1936, seems to make little difference to the law of processions, except that urban authorities can, with the approval of the Home Secretary, prohibit all processions of whatever kind in any area where the ordinary powers of the police are inadequate to preserve order. At the same time the use of political uniforms was prohibited.

If, of course, you hire a hall for an indoor meeting, you escape the law of trespass and nuisance, and you generally have stewards to see that order is kept. For, anyone who enters the hall does so under a licence from the promoters and, if he attempts to provoke disorder, the licence may be terminated and he himself expelled. Indeed, the Public Meetings Act, 1908, gives the holders of a meeting the right (hardly ever exercised) of prosecuting creators of disturbance. But it is now certain that the promoters cannot exclude a police officer from a public or from, it would seem, a private meeting, for a police officer is entitled to be present to detect and, if possible, to prevent any incitement to sedition or breaches of the peace.

In brief, it is not at all difficult today to hold a public meeting if one is prepared to pay for the use of a hall or to submit to a certain control of the police out of doors, a control which is exercised almost entirely for the purpose of preventing disorder and obstruction to traffic and not for the pur-

pose of suppressing the free expression of opinion. Only in periods of extreme emergency does this mild regime give way to a more stringent one, on the grounds that in time of war the nation has made up its mind on essentials and cannot allow its purposes to be thwarted. Yet even during the two World Wars a freedom of expression was allowed which in many countries would not be tolerated in times of peace.

Civil liberty shades off into political and economic liberty. Parliament being sovereign, there is no guarantee of civil liberty except by seeing that Parliaments are elected which will ensure its maintenance, and this implies the existence of political liberty, or the right of every citizen to play his part in determining the composition of government and in holding the wielders of power responsible for their acts. Historically this second form of liberty has been achieved by insisting on the principle that there shall be no taxation without representation, an expression of the right of property, which is itself an aspect of economic liberty.

#### Liberty and Property

If there was anything of which eighteenth-century Englishmen were convinced it was the importance of securing property rights. John Locke even went so far as to say in his *Second Treatise of Government* that "The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property." Property was indeed treated with peculiar respect in the eighteenth century, even the control by power and influence, which many great men exercised over seats in the House of Commons, being treated as property, not to be taken away lightly even when it was felt to be against public policy.

Apart from taxation, which was made to fall mainly on the class of country gentlemen who sanctioned it, property was interfered with only by private Act of Parliament. But it would be idle to deny that Parliament was guilty of legislating in the interests of the land-owning class and in a manner which bore very hardly on small landed proprietors or persons having rights



## LABOUR DAY PROCESSION

*Labour Day in Great Britain is usually held on the first Sunday after May 1. On that day there is a rally of trade unions and Socialist organizations, seen here in procession.*

in the village commons. The Enclosure Movement, though it carried out very necessary improvements in agriculture, was too often conducted with a callous disregard for those who were unable to take care of themselves. Even the personal freedom of the working classes was by no means so complete as it later became. One cannot look far into the novels of the eighteenth century without encountering the press-gang, which seized seafaring men for the incredibly hard and ill-paid service of the Royal Navy, while under the Act of Settlement of 1662, Justices of the Peace were given power to remove from a parish, within forty days of his arrival, to the parish from which he had come, any person who seemed likely to become entitled to poor relief. To a great extent the eighteenth-century agricultural labourer bore the marks of serfdom, for he was almost fixed in his parish. But above all, down to the third quarter of the nineteenth century the law made it very difficult for workmen to combine for the purpose of raising wages or improving conditions of employment.

Those days, however, are now completely past. Trade unions can be founded with the greatest of ease and in the Emergency Powers Act, 1920, the right to strike is expressly reserved. Even in the First World War there was little control of labour, and the Essential Work Order of the Second World War bound employers and employees with equal stringency. It is indeed a commonplace that the real units in modern society are groups rather than individuals.

This is not to say that individual liberty has suffered. The Englishman at least has not been content to be merged in his church or his trade union and has insisted on retaining his individual liberty. But he has gradually come to see that "a necessary man cannot be free."

This is a comparatively new belief, for down to the last quarter of the nineteenth century most people thought that the ordinary man's best chance of acquiring property and the freedom that was unattainable without it was to live in a *laissez-faire* society, in which the State interfered

as little as possible with the holding of property or the processes of business. But they had already found it necessary to check certain malpractices in the interests of public health and they eventually recognized that the economic security of an ever-growing portion of the working class could not be procured merely by individual thrift and industry. The State could no longer merely remove fetters. It must provide services through its organs of central government or through local authorities. From education it moved on to national insurance of various kinds, and concurrently entered upon the path of municipal trading, only now beginning to envisage socialism on the grand scale. All of this means for some classes increased control. For others "controls" spell new forms of liberty, the "freedom from want and freedom from fear" of which the late President Roosevelt spoke in one of his most famous speeches.

There is in all this a danger even to the beneficiaries themselves, a danger that they will insensibly barter their freedom for security. One of the greatest challenges of our time is to find a way of adding economic liberty to the liberties already gained without losing the substance of some of the latter in the process. For elsewhere the quest for security has led to totalitarianism, and we shall do well to remind ourselves that that is a philosophy which was preached in its most extreme form by the seventeenth-century Englishman, Hobbes.

#### Separation of Powers

Many of those who fear the encroachment of government on the sphere of personal liberty appeal to a doctrine first clearly enunciated in 1748 by Montesquieu, but best expressed in the Declaration of Rights, included in the Constitution which Massachusetts set up for herself shortly after achieving independence.

"In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them, the executive shall never exercise the legislative and judicial powers, or either of them, the judicial shall never exercise the legisla-

tive and executive powers, or either of them, to the end it may be a government of laws, and not of men."

Now, although Montesquieu derived this doctrine of the Separation of Powers from an examination of the British Constitution as it existed in the first half of the eighteenth century, the British have never followed it consistently; for, as we have seen in an earlier chapter, they have

tive schemes and acts imposing direct and indirect taxation. One would find executive government consisting for the most part in the performance of duties prescribed in detail by this legislation of Parliament: executive officers rarely had discretionary powers conferred on them. The enforcement of legislation, so far as the ordinary citizen was concerned, was mainly in the hands of the judges and juries who tried



PRESS-GANG SATIRIZED BY GILLRAY

*They have captured a miserable tailor and are attacked by angry women while they haul him off—an unpopular means of recruiting for the navy*

departed from it by bringing the executive and the legislature into such close association that they work almost as a single whole, and by making the executive and the judicature subordinate to the legislature under the parliamentary doctrine of sovereignty.

Either, it seems, Montesquieu's analysis was not searching enough, or it has not been sufficiently modified to fit the facts of modern government. It just happened that in the eighteenth century, if one looked only at the central government, one would find Parliament making practically all the general rules there were, laws, administra-

him for offences he was alleged to have committed. But these simple arrangements worked only because most of the work of governing the country was not done by the central departments, but left to the justices of the peace, who, in the exercise of their miscellaneous functions, did not act on any theory of the separation of powers.

#### Separation of Powers Today

But whatever the historical origin of the doctrine of the Separation of Powers may have been, we are more concerned today to ask how far it is a doctrine which can or ought to be applied in the far more com-



plicated conditions of modern government. The tide seems to be set strongly against it. Parliament now regularly delegates to the government departments powers to legislate, and it allows both government departments and local authorities to exercise functions which, if not strictly judicial, are akin to those usually performed by courts of justice.

### Legislation

This practice, however, has been criticized as dangerous to the liberty of the individual. For some people feel that since government departments necessarily exercise discretionary powers, every increase in their powers implies an encroachment of discretionary, or, as it is often called, arbitrary, action at the expense of law; and that this is particularly objectionable if the government is empowered to exercise functions which seem peculiarly the province of the legislature and the judiciary, namely, the making of general rules binding the ordinary citizen and the decision of cases affecting the citizen's personal or proprietary rights, more especially when it involves the final interpretation of the law.

There is much to be said for the view that legislation and the adjudication of disputes involving points of law should be left as far as possible to Parliament and to the courts respectively. The courts have evolved during many centuries a procedure and a tradition which ensure not only a high degree of impartiality and expert knowledge, but also a probability that all conflicting views which are at all tenable shall be brought to their notice. Moreover, the requirements, maintained in all but a very few exceptional instances, that all judicial proceedings shall be held in public, enables justice not only to be done, but to be seen to be done.

Legislative procedure again, as developed in Parliament, has many of the safeguards of judicial procedure. It is public, and it secures that contentious bills are debated at length and in such a way as to bring to bear all possible arguments for and against their general policy and their detailed provisions. In private bill procedure the committees show the same impartiality as



MONTESQUIEU

*First published in 1748, Montesquieu's "L'Esprit des Lois" was a masterly survey of the forms and systems of world governments, law, politics and religion*

judges, and they have the advantage of hearing both evidence and arguments by expert counsel. In procedure on public bills the judicial element is, of course, not present, for the majority is entitled to make its views prevail, but on the other hand the majority can reasonably claim that its policy has the approval of the electorate. In any case, the existence of a regular and well-informed opposition guarantees that proposals shall be subjected to the criticism of a body of what may fairly be called professional "no-men," whose business it is to search for defects and bring them to the light of day.

Further, our legislative procedure ensures that the high policy, evolved by the government departments and the Cabinet, shall go through the crucible of Parliament and come out as law. The great legislative monuments of public law, such as the Workmen's Compensation Acts, the Education Acts and the National Insurance Acts, are, as we have seen, constitutions for the various services, subject, of course,

to amendment from time to time, but intended to be permanent in their main outlines. Every civil servant or local government officer knows the importance of this. If a new service is being established or an old service overhauled, every effort must be made to foresee and provide for all eventualities by procuring from Parliament a grant of the necessary powers. For anything done outside the powers granted by Parliament is *ultra vires* and therefore illegal.

#### Safeguarding the Citizen

If this should happen to interfere with the rights of any private citizen, there will very likely be a lawsuit ending in the quashing of what has been done and perhaps in an award of damages against the wrongdoer, for the courts will show no special leniency towards the government, but will protect the citizen against official encroachments on his rights, and in any event the Comptroller and Auditor-General will refuse to issue money for a purpose which he knows beforehand to be *ultra vires*, and will bring to the notice of the Public Accounts Committee of the House of Commons any *ultra vires* expenditure which he was unable to prevent. Moreover, once Parliament has laid down the lines on which a service is to be run and given the necessary powers, the pressure on parliamentary time is such that alterations are difficult to obtain except at long intervals.

This need to act always within the powers conferred on them by law and to be in constant readiness to furnish ministers with answers to parliamentary questions undoubtedly serves the cause of liberty by making government departments realize that they are the servants, not the masters, of the public. But, it is said, if they are empowered to make regulations, rules and orders having the force of law, they will gradually lose their sense of subordination. They will be able to form their own policy and carry it out without the intervention of Parliament or the courts, and the danger will be all the greater if they can then adjudicate, without appeal to the courts, on matters arising out of the legislation they have made. Moreover, in certain cases they

have been empowered to combine the processes of legislative, executive and judicial action. They can sometimes investigate a scheme submitted by a local authority, decide in the exercise of their discretion to approve it and thus give it the force of law. Where this happens—and it is now a regular part of the process of slum clearance—the advantages secured by the Separation of Powers disappear.

There is substance in these fears. On the other hand, it is generally admitted that even the most *laissez-faire* governments cannot carry out their duties to the country without a considerable delegation of legislative functions. Moreover, if discretionary powers must be entrusted to the officers of government—and this is unavoidable—the risks of arbitrary action are reduced if general rules are made by Ministers as the heads of departments. For though subordinate legislation is the work of the executive, yet it possesses the virtues of legislation, it is general in its application, and it informs the public beforehand how the executive will exercise the powers entrusted to it. Some at least of the criticism of subordinate legislation merely expresses the dislike which many persons have on principle, and most persons feel when they are personally affected, of government interference with the property and activities of the private citizen.

#### Exclusion of Control

More important is the objection that attempts are sometimes made to exclude the operation of the doctrine of *ultra vires*. Thus in a few cases statutes have provided that the mere making of a regulation or order shall be conclusive evidence that a proper occasion for it has occurred, others have enacted that any regulation or order made under the Act shall have effect as if it were part of the Act—a provision the meaning of which is still not quite certain—and others again have provided that the Minister concerned shall have power, though only for a limited time, say six months, to make regulations varying actual Acts of Parliament, where such a course is necessary to remove difficulties. Of these it may be said that the two former kinds of

provision hardly ever occur nowadays, and that the last-mentioned is and always has been very rare, being used only to assist the bringing into force of some gigantic new scheme like the National Insurance scheme of 1911, or where there is a vast mass of Local Acts the effect of which on the legislation in question cannot always be foreseen before or during the proceedings in Parliament

#### Powers in Emergencies

Finally, there is the most serious objection of all. The delegation, it is said, may be in such wide terms as to involve a surrender by Parliament of its legislative power. A good example of this will be seen if we look at the method by which the extremely far-reaching economic controls which are still largely in force were introduced. The Emergency Powers (Defence) Act, 1939, enacted that

"His Majesty may by Order in Council make such Regulations . . . as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community."

Under this power a Defence Regulation, number 55, was made, providing that

"A competent authority, so far as appears to that authority to be necessary in the interests of the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by order provide

(a) for regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles of any description . . ."

It was under this Regulation that the Minister of Supply and the Minister of Food, among other "competent authorities," established the controls

The point to be noticed here is not so much the scope of the delegation of legislative power by Parliament to the executive

as the complete exclusion of judicial control, for once the "competent authority" is satisfied that an Order is "necessary," no one can question his decision.

Such a delegation of power has hitherto occurred only in the great emergencies created by the two World Wars. On both occasions it was generally felt that Parliament must for the time being surrender much of its legislative power to the government. It is also common ground between the parties that during the continuance of acute economic stringency the government must retain these powers. The present Labour Government, which is by no means opposed in principle to subordinate legislation, is using Acts of Parliament to establish its new schemes and is reserving legislation by the Executive for its proper function of carrying these Acts out in detail.

#### Public Versus Private Interest

On the whole, greater disquiet has been expressed, especially by lawyers, at the granting of judicial or quasi-judicial powers to administrators, whether central or local. It is felt that it endangers two important principles of "natural justice" which the courts have developed in order to ensure the impartial determination of disputes, namely, that no man may be a judge in his own cause, and that no man may have his rights adjudicated on without being given ample opportunity of putting forward his own view of the case.

It is felt that an administrator often is, and always tends to be, a party to a dispute arising in the course of administration, for he represents the public interest, and commonly the dispute is one in which a supposed public interest has to be balanced against the private interest of a citizen. It may be unobjectionable that a government department should arbitrate between two local authorities, as in cases about the settlement of paupers in one county or another, for then there is no reason to suspect its impartiality; but if, for example, it is given exclusive authority to decide appeals against the rulings of local authorities in town-planning disputes, there is a suspicion that it will lean against the citizen, for the simple reason that it will

naturally wish to ensure the execution of a policy which has originally emanated from itself.

If all such appeals were heard in public by administrators specially set apart for the purpose, there would, it is felt, be less danger of voluntary or, what is much more likely to occur, involuntary partisanship, while at the same time expert knowledge of the problems of administration would be secured.

#### French System

This, in substance, is the system which prevails in France, and it is one from which the British have something to learn. There the doctrine of the Separation of Powers has been given a twist that is surprising to lawyers brought up in the English tradition. Not only is the administration not to interfere with the courts, but the courts are not to interfere with the administration. If a private citizen is aggrieved by an act of the administration his proper remedy is to apply for redress to the administration itself, not to the courts.

This might be expected to favour the administration unfairly, and for the first half of the nineteenth century administrative justice seems to have been somewhat arbitrary. However, during the Third Republic the *Conseil d'Etat*, which is the supreme administrative organ, developed into a court, as independent of the government as the ordinary courts, and it built up a coherent system of administrative law (*droit administratif*) in much the same way as Common Law was made by the courts in England. Frenchmen, far from resenting the withdrawal of their disputes with the administration from the ordinary courts, are satisfied that the *Conseil d'Etat* is thoroughly impartial and the justice it administers cheap. Moreover, since its members are old administrators, it does not feel hampered by lack of expert knowledge in controlling the acts of the administration.

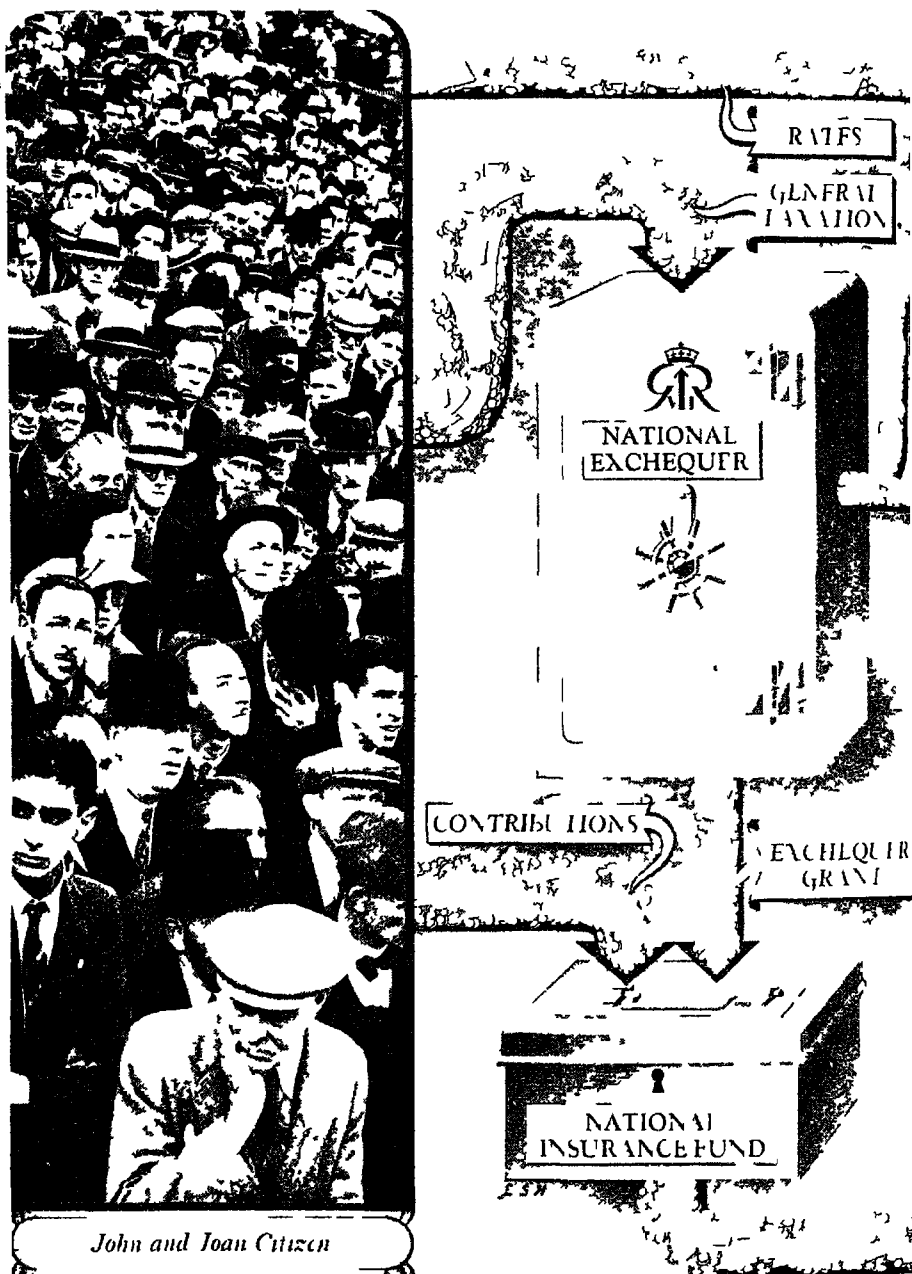
In England, however, in the absence of a statutory provision to the contrary, a government department follows its ordinary administrative procedure when trying

cases which involve the private rights of the subject, and that procedure, as it has been described in Chapter IV, involves the co-operation of officers of different ranks, all of whom are engaged for most of their time in the normal work of administration.

It is true that all parties concerned whether they are public authorities or private persons, must be given a fair opportunity of putting forward their view of the case, and each side must be allowed full knowledge of the evidence and arguments put forward by the other, but they have no right to a public or even a private oral hearing. It is true also that any person who contends that the dictates of "natural justice" have not been observed in his case may apply to the ordinary courts, which long ago decided that they would not allow a decision arrived at in such circumstances to stand. Thus they have quashed a town-planning decision of a local authority in which a councillor took part who was interested in the land concerned. Similarly, they have quashed a decision to refuse the renewal of a liquor licence given by justices, one of whom had at an earlier stage opposed the granting of the licence. But if, for example, Parliament says that town-planning appeals are to be decided by the Ministry of Town and Country Planning, the courts cannot quash one of its decisions merely because the Minister or one of his civil servants has taken part in making or formulating policy in the matter.

#### Courts Lack Control

The courts will also quash administrative decisions which in their opinion have been taken for a purpose other than that for which the discretion was conferred by Parliament. But all in all, they have little practical control over the acts of administrative authorities, so long as these keep within their powers and avoid the more obvious forms of injustice. Nor is there any general rule that a person may appeal from an administrative decision to a court on a point of law, still less on a point of fact, though occasionally such appeals are specially authorized by statute. Hence some Englishmen envy the Frenchman who can apply to the *Conseil d'Etat*



YOU PAY MORE

An illustration designed to show the vast extension of social services with which we



*Health Services*



*Unemployment Benefit*



*Family Allowances*



*Sickness etc. Benefit*



*Retirement Pension*



*Maternity and other Benefits*

BUT YOU GET MORE  
have become familiar." Increased income tax and rates help to pay for many of them.

to have an administrative decision quashed or to be given compensation on the ground that he has been unjustly treated, for the *Conseil d'Etat* is in the peculiarly favourable position of being staffed by officials who are perfectly familiar with administrative problems but are at the same time completely independent of the government. In Britain the administrator who is called upon to give a decision is part of the government, whereas the judges, even when they have power to examine administrative acts, may lack the administrator's special knowledge and so fail to exercise it wisely.

To judge fairly the current objections to administrative jurisdiction is a difficult task. It must always be remembered that any serious injustice in a particular case would be bound to be aired in Parliament, which, as we have seen, is at its best in such cases. It is true that a Minister can usually parry a question by saying that he or his department acted judicially in the case in question, but if the case is a bad one he will not easily hear the last of it either in Parliament or in the Press. Moreover, we have already seen that the mere possibility of a parliamentary question keeps civil servants on their toes. In a sense it may be said that in England Parliament performs the functions performed in France by the *Conseil d'Etat*.

Another safeguard has been suggested, and is already to some extent adopted by government departments. Departments should always give reasons for their decisions. The practice of delivering reasoned judgments has contributed as much as anything to the respect in which the courts are held, for it is almost impossible to act in a capricious or arbitrary fashion if one is bound to disclose one's mental processes.

#### Moving Towards Equality

For about two hundred and fifty years after the Revolution of 1688, progress to most Englishmen meant a steady increase of civil and political liberty. More recently economic liberty has become the watchword of reformers, and there is a tendency to under-estimate the old Whig liberties which have already been attained, the more so because one of these, the security of

property, sometimes now seems to stand in the way of progress. The events of the last dozen years have made us realize better the value of the Whig achievement, but the urge towards equality, which is the goal towards which economic liberty tends, is not likely to diminish.

It used to be said that Englishmen, while they prized liberty, were not interested in equality. That was never true of all parts of the country or of all sections of society. There have long been radical elements permanently at war with anything that could be considered privilege, and they are particularly powerful in the North of England, to say nothing of Scotland and Wales. On the whole they were in the past more concerned, as Americans still are, to create equality of opportunity. Much has been done along that line, and in education at least the nation is now committed to the complete working out of the idea. But two wars and the industrial depression of the intervening years have brought the nation much nearer to actual economic and social equality than their fathers would have thought conceivable, and it would be quite untrue today to say that Englishmen are indifferent to equality.

#### Economic Revolution

The Englishman is not, perhaps, much interested in equality as an abstract proposition, nor are others grudged their greater wealth or higher social position provided the rest have enough themselves. But when in straits he insists on equality of sacrifice and on the equal distribution of necessities that the best efforts of administrators—and a good best at that—can ensure. In time of war or scarcity the nation takes to rationing at least as well as any other people, and the idea has come, perhaps to stay, that priority of supply shall not depend merely, or even mainly, on the possession of wealth.

Economic liberty for all implies, of course, more than this. It is still a distant goal, but at least some steps have been taken towards it. Since the beginning of this century the United Kingdom has been passing through an economic revolution, the end of which is not yet in sight. The

nation has accepted the idea of the State as an instrument of service and not merely as one of power. The change has been wrought mainly by the use of the taxing power of Parliament, especially by the imposition of progressive income tax and death duties, and its result is the vast extension of the social services with which we are familiar.

For the most part these services have been introduced with no deliberate intention of readjusting the distribution of the national income, and indeed until the commencement of the Second World War there was little alteration in the proportions held by the different income groups. What had happened up to that date was that the landed gentry, who had been so powerful during the eighteenth and nineteenth centuries but whose influence was already on the wane in the closing years of that period, had given place to other classes, mainly to those who had made their money in industry, commerce and finance. Great wars always tend to produce a redistribution of incomes, and it is already clear that the last was no exception.

On some, at least, of the further measures which the ideal of greater economic

liberty for all will call for, such as the conquest of unemployment and the attainment of freedom from want, there is, in principle at least, though not always in the details of procedure, already a large measure of general agreement. What the pursuit of the ideal will entail will doubtless be discovered in Britain in the traditional British way—by a process of trial and error. It is enough here to point out that the British Constitution places no kind of legal obstacle in the way of any changes which the nation decides to make. That follows from its fundamental principle of the sovereignty of Parliament, and the guarantee that this sovereignty will not be abused is, as we have seen, not legal, but political.

An American writer on constitutional questions, Professor McIlwain, has said that the reason why England needs no written constitutional guarantees is because her traditions of government are so old and firm. Fortunately those traditions are the common heritage of the British, who may surely look forward with hope and confidence to the extension of the rule of law from the field of civil and political to that of economic liberty.

### *Test Yourself*

1. What is "Habeas Corpus"?
2. What is meant by "The Rule of Law"?
3. What was the importance of the lapsing of the Licensing Act in 1695?
4. When was the wearing of political uniforms made illegal?
5. What is "reading the Riot Act"?
6. What is the doctrine of the "Separation of Powers"?
7. What is "administrative law"?
8. What does an English court of law mean when it speaks of "natural justice"?
9. Can liberty be properly divided into civil, political and economic spheres?

*Answers will be found at the end of the book*





#### LAW COURTS, STRAND

*The opening of the Royal Courts of Justice in the Strand in the latter half of the nineteenth century brought together under one roof all superior courts, such as the King's Bench, Chancery and Admiralty Divisions. Here civil, as distinct from criminal cases, are heard*

# THE ENGLISH LEGAL SYSTEM:

## A GENERAL SURVEY

MOST of the laws under which Englishmen live today are contained either in Acts of Parliament, or in orders or regulations or by-laws made by subordinate authorities, such as government departments or county or borough councils, to which Parliament has delegated limited powers of law-making. We have seen in an earlier chapter how laws of this kind are made, and that those made by the subordinate law-making bodies are only valid if they are *infra* and not *ultra vires*, that is to say, if they conform to the limits of the powers which Parliament has granted.

All these laws are written laws, they can be found in authoritative texts. But that is not the case with the whole of English law, in fact, all this written law assumes the existence of many fundamental principles in the law which are nowhere to be found in written form. If this foundation of unwritten law were to be destroyed, most of the written law would become unworkable or even unintelligible.

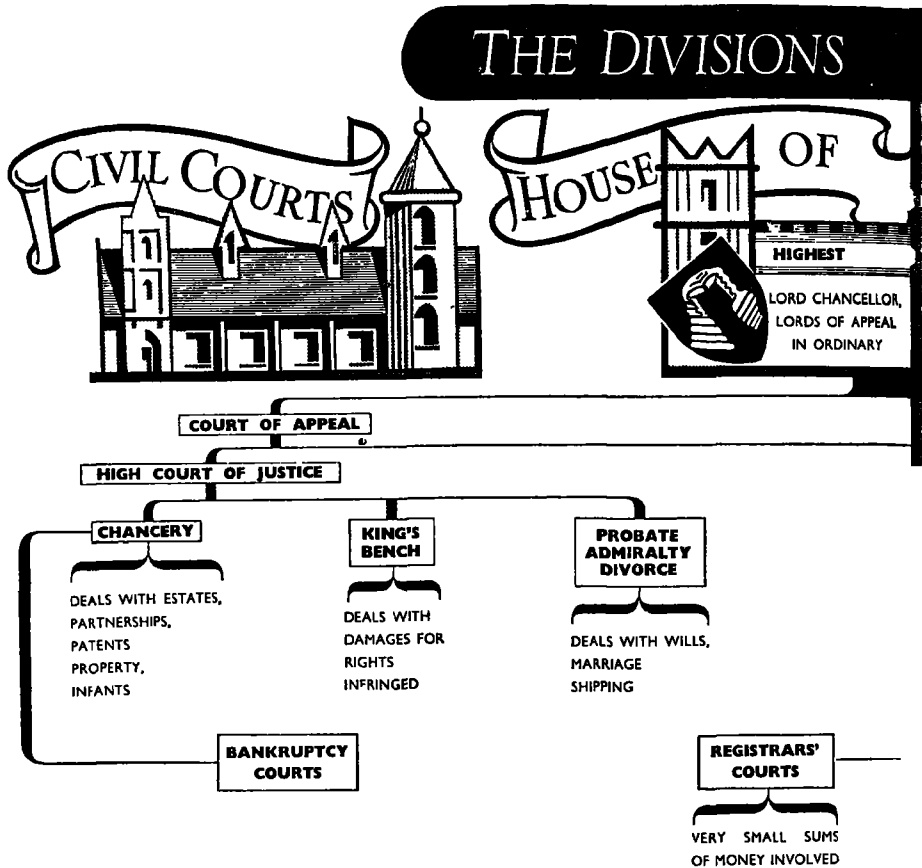
It is this state of things that is referred to when it is said that English law is not a 'codified' system. A code professes to be a statement in an authoritative form of the whole of the law, or of the whole law on some particular subject. Actually no code ever does contain all the law, if only because the facts to which law has to be applied are so infinitely varied that it is quite impossible for the makers of any code to foresee or provide for them all. That is one reason amongst others why most Englishmen who have studied the subject do not think that a code would do much to improve the law. So, although some topics of the law have been codified in modern times, we still rely on unwritten law for most of the more fundamental principles.

This unwritten law is either Common

Law or Equity, and, as with so much else in English government, we have to go to history in order to understand the origin of these terms and the difference between them. For the origins of the Common Law we must go back about eight hundred years to a time before there was any national system of law in England, to a time when, in fact, the English were only being welded into a single nation.

The Norman and Angevin kings of those days were determined to unite the nation and to make the strength of the monarchy felt, or, in the legal phrase, "to make the king's writ run," throughout the length and breadth of the land. Now it was impossible for them to govern the country by setting up a vast system of administration at the centre such as we have today, difficulties of communication alone would have prevented that. The details of government had necessarily to be left to local authorities, and the problem was how these could be controlled from the centre. The kings found that their judicial power was the most effective instrument for this purpose, and their practice was to send their judges to tour the country and to see that it was being properly governed.

Hitherto the laws under which the country lived had varied a great deal in different places, and the courts were local bodies, courts of shires or boroughs or feudal lords. But when the king's judges came, they naturally began to iron out these differences and to apply more or less the same principles everywhere, without much regard for particular local customs, and thus a law began to emerge which was the same all over the country. This was the origin of what we still call the "Common Law" although the local laws, from which the term originally distinguished it, have long ago disappeared.

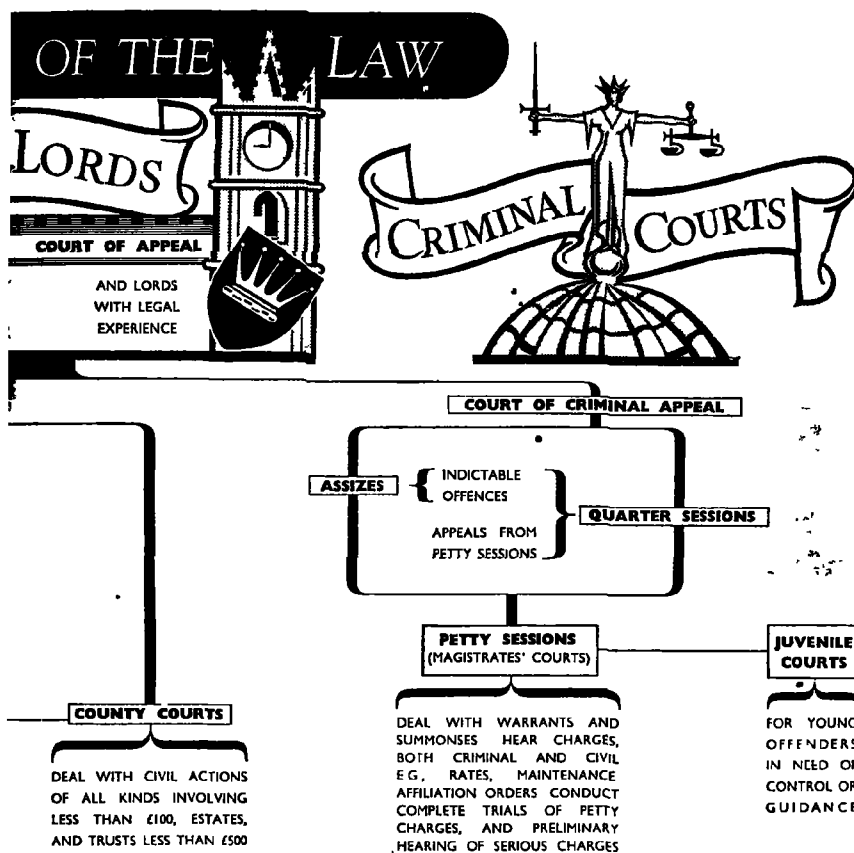


*The chart distinguishes between the main branches of the law, civil and*

It was the origin, too, of the "Assizes," the courts which judges still hold under the king's commission when they tour the country "on circuit."

This early unification of English law, which took place centuries before any similar process in the other countries of Western Europe, has been an event of abiding importance. It gave the country a strong law, and perhaps it is partly the strength of the law that has made of Englishmen one of the most law-abiding nations in the world. Then again it was because the law was so strong and had struck its roots so deep into the life of the nation that it was able to resist foreign influences

Here the test came in the sixteenth century. Most other countries had adopted the Roman law, either in substitution for, or alongside of, their own native systems, and even Scotland, which still has a system of law different from that of England, felt the influence. But there are few traces of Roman influence in English law, and as English law has now spread overseas to the United States and the British Commonwealth of Nations, it has come about that today the laws of the countries which draw their civilization from Western Europe are divided between two great systems. the English and the Roman-influenced Continental countries find it easier to



*criminal, and the names and duties of the courts of law relating to each branch.*

work with one another in legal matters than with the British, and between Britain and America the common origin of the laws is probably as close a link as the language.

Another result of the unification of the law, or at least of the method by which it came about, was to give to the office of a judge a prestige and influence far above that which it holds in any other system. The Common Law is still, as it was in its origin, a judge-made law, and it has always seemed natural to the English that law should be made in that way, and not only by the express enactments of a legislative body. We shall see how great is the influence that English judges have been

allowed to exercise when we come to consider in more detail the system of developing the law by "precedents," that is to say, of treating cases decided by the courts as sources of the law which other courts must follow when similar questions of law are raised before them.

The Common Law is still the most fundamental element in the British system. In particular, it covers the general principles of the law of contracts, and those of civil wrongs, such as trespass, nuisance, and the like, or "torts," as lawyers call them. The criminal law, too, was Common Law, though most of it has now been put into statutory form. But England has also



#### FLEET DEBTORS PRISON

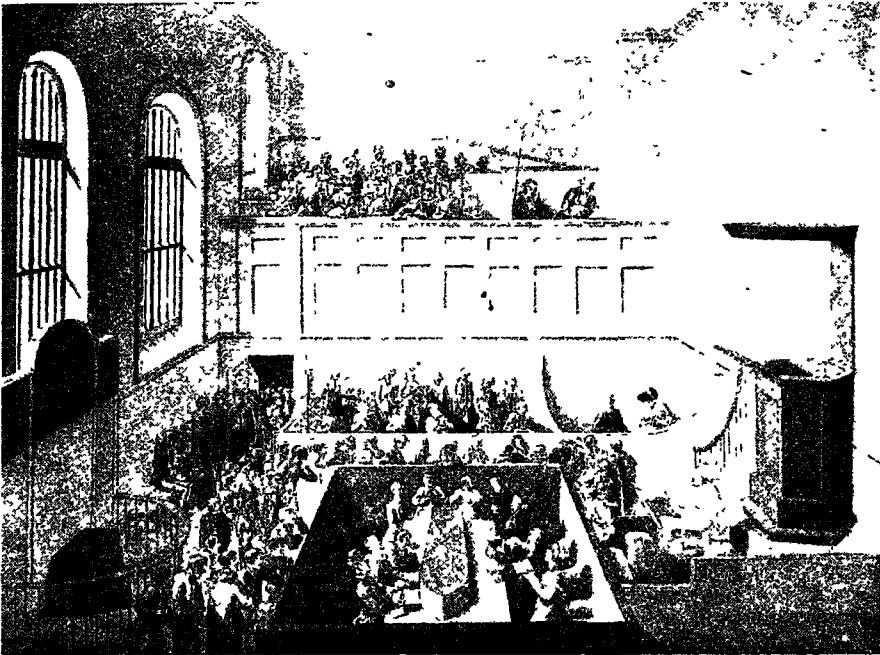
*At the beginning of the nineteenth century the debtors' prison as described in *Pickwick Papers* or seen in Rowlandson's drawing, above, was still an accepted institution. Within the confines of the prison the debtors had at least some freedom of movement.*

another kind of unwritten law, also judge-made, which we call "Equity," a term which often misleads the layman by suggesting rules which are less binding than genuinely legal rules. That was true of Equity originally, but it ceased to be true about two hundred years ago, and today Equity is just as truly law as is the Common Law itself. The layman therefore may well ask what the difference is between them.

We must go again to history for the explanation. There came a time about the fifteenth century, when the Common Law seemed to be losing its powers of expansion. Judges were ceasing to adapt it to the changing needs of English society, and the country, too, was passing through a period of disorder in which justice often required a procedure less technical and dilatory, and methods of enforcement more summary, than those that the Common Law was

providing. The coming of Equity saved the situation, and this shortly is what happened.

The law had always regarded the king as the "fountain of justice," and the courts were his courts. That being so, if his courts were failing to give justice, an aggrieved subject must be entitled to appeal to the king over the heads of his servants, the judges, and to pray him to grant a remedy out of his grace. The king passed petitions of this kind for consideration by his chancellor, who was not then a judge as he is today, but the legal member of the king's council, and "keeper" as it was said, of the king's conscience. Now suppose the chancellor, receiving one of these petitions, felt that it put a deserving case. What could he do about it? He could not alter the Common Law, he could not issue orders to the judges. But he could issue orders to the parties in a



#### RELIGIOUS SIDE OF EIGHTEENTH-CENTURY PRISON LIFE

*In notorious Newgate Gaol, however, there were fewer privileges. Here Rowlandson presents the chapel service. The convicts join the earnest preacher in a hymn, and those condemned to death are ferociously reminded of their doom by being seated around a coffin*

Common Law action, and he could fine or imprison them if they disobeyed. That was what he did. In a proper case he would order a plaintiff to refrain from his action, or forbid him to enforce a judgment which a court might have given in his favour, or order him to use in a certain way some rights that the Common Law would have allowed him to use as he liked. Thus, though he could not alter the legal rights of any of the king's subjects, he could and did prevent them from exercising those rights if he thought that it would be inequitable for them to do so.

As the practice developed, there began to emerge principles on which it was known that the chancellor would be likely to act, but it was not until the beginning of the eighteenth century that Equity ceased to be a somewhat arbitrary system, which varied, so it was said, with the length of each

chancellor's foot. In the course of that century, however, the principles of Equity became almost as well settled as those of the Common Law, and the method of their development from case to case has been the same. That meant that the chancellor had become a judge, and that his chancery, which was once an office for administrative work, had become a court of justice. It also meant that we had now two independent systems of courts, applying two separate kinds of law, and this extraordinary state of things actually lasted until 1873. In that year the Judicature Act established for the first time a single system of courts, it did not amalgamate Common Law and Equity but it settled the relation between them by enacting that where they conflicted Equity was to prevail.

Thus the distinction still remains, and it is not easy to state its effect in a few words

The metaphor of a book and its appendix may help. Common Law is the book, and just as a book may get out of date, so did the Common Law. Now when a book gets out of date, the author may do one of two things—he may either rewrite the whole book, or he may leave what he wrote standing and add an appendix. Equity is, in effect, this appendix. It is not a complete system of law, by itself it would be as unintelligible as an appendix would be without the book to which it belongs. Equity consists of a miscellaneous collection of principles, not systematically related to one another, but each tending to make this or that rule of the Common Law more equitable than it would otherwise be.

#### Principle of the Trust

The best illustration of the relation between Common Law and Equity is the "trust," which is a purely equitable institution, and the most important of the innovations that Equity introduced into the law. Trusts have been justly described as the greatest achievement of Englishmen in the field of jurisprudence, they are all-pervasive in English law, and it is only in English law and the systems derived from it that they exist. Yet the underlying principle of all of them is simple. It is merely this: that although one person may be legally entitled to some right, a right of property, for instance, and therefore, so far as the Common Law goes, entitled to exercise all the powers that that right implies, yet, because of the manner in which the right has come to him, or for some other reason which Equity considers ought to affect his conscience, Equity will only allow him to exercise his right in a certain way. If the trust is an ordinary private trust, the person who has the legal right, whom we call the trustee, must use it for the benefit of some other person or persons, the beneficiary of the trust; if it is a public trust, he must use it to further some particular object, such as a charity or a trade union. The trust has even been introduced into international law in the Trusteeship System which the United Nations have set up, and there the idea is still the same, the state to which a trust territory is handed over to administer is not

by any means a free agent; it must use the powers which are given it only for the "basic objectives" which the Charter of the United Nations specifies.

#### "Actions" and "Prosecutions"

When we turn from the sources to the contents of the law, the most important distinction to note is that between civil and criminal law. The object of civil proceedings, which we call "actions," is to give redress, usually in the form of pecuniary damages, to some private party whose rights another has infringed. On the other hand, in criminal proceedings, or "prosecutions," the law does not regard the wrongful act as something that concerns only the particular person whom it has injured, it considers that there is a public interest at stake, and its aim is to protect society against such acts by punishing the offender. In English law this public interest is symbolized by the fact that all prosecutions are brought in the name of the king, they may be instituted by any member of the public, but usually that task is left to the police.

#### The Courts

The law has separate hierarchies of courts for these two kinds of proceedings. For civil cases the lowest courts are the County Courts, which decide cases in which the amount at issue is small. The country is divided into rather more than fifty circuits, and each circuit has a judge from whose decision there is generally an appeal to the Court of Appeal.

Above the County Courts, since the amalgamation of the Equity and Common Law courts which has been referred to above, there is one Supreme Court of Judicature, consisting of two parts: the Court of Appeal, in which sit the Master of the Rolls and eight Lords Justices, and the High Court of Justice, in which the judges are the Lord Chief Justice and about thirty Justices.

The High Court is subdivided into three Divisions, Chancery, to which most of the cases which formerly belonged to courts of Equity are assigned, King's Bench for the Common Law cases, and Probate, Divorce and Admiralty, three subjects whose con-



#### JUDGES IN THEIR ROBES OF OFFICE

*Just before the new year opening of the Law Courts in the Michaelmas term, the Judges, wigged and robed, attend a service in Westminster Abbey. Here the Judges of the King's Bench lead the procession from the Abbey after the service.*

necting link is that before the amalgamation of the courts they belonged neither to Common Law nor to Equity, but drew their principles from canon and international law. Probate and matrimonial jurisdiction (there was no divorce until 1857) had been exercised by the ecclesiastical courts, and admiralty cases had a separate system of their own. The Court of Appeal and the High Court sit in London, but the judges of the King's Bench Division also hear civil cases in the country at the Assizes. Petitions for divorce are also now heard at the Assizes.

All criminal trials begin in a magistrates' court, but as the work of these courts is

described in the next chapter, it is only necessary here to show their relation to the other parts of the judicial system. Magistrates have two kinds of criminal jurisdiction. When they sit as a Court of Summary Jurisdiction, they conduct the whole trial of a case and give judgment. In other cases their function is only to hold an examination, which is not itself the trial but only a preliminary to it; they decide not whether the accused is innocent or guilty, but whether there is a sufficiently strong case against him to make a trial necessary. If they think that there is they commit him to trial by a jury, either to the Assizes or to Quarter Sessions, if not, dismiss the case.



Which of their jurisdictions the magistrates must use depends upon the nature of the offence charged, and originally the matter was simple. All crimes in English law are either indictable or non-indictable. An indictable crime is one in which the particulars of the charge have to be set out in a formal document called an indictment, and it is on this that the jury try the person accused, indictable therefore implied originally that the offence was triable by a jury and in no other way. On the other hand, if the offence is one for which an indictment is not the prescribed procedure, then it was one for the magistrates' summary jurisdiction that is, one which they could try themselves.

#### Magistrates' Powers

This distinction may sound technical, but at least it was based on a straightforward principle. Unfortunately, in the modern law it has become blurred. From time to time Parliament has increased the range of the magistrates' summary jurisdiction by bringing this or that offence within it, and now they can try many of the indictable offences provided the accused consents, as he is nearly always willing to do. In fact, the indictable offences that the magistrates now try are far more numerous than those which they send to be tried by a jury in one of the higher courts. Conversely, Parliament has also provided that in some of the more serious non-indictable charges the accused must be given the option, which he very rarely takes, of being tried by a jury. In the result the law which defines the exact extent of the magistrates' summary jurisdiction is based on no clear principle and is only to be found in a bewildering mass of details in many Acts of Parliament.

Still, despite many anomalies, it is roughly true to say that the more serious crimes are tried before juries either at Quarter Sessions or at the Assizes. A few of the most serious of all can only be tried at the Assizes. Happily, however, crime is not generally a major social problem in England, and all but a tiny number of crimes about one per cent of the whole, are tried by the magistrates and do not go to either of the higher criminal courts.

A court of Quarter Sessions is differently constituted according as it sits in a county or a borough. In a county the magistrates are again the judges, but they sit with a jury, and not alone, as they do in their Courts of Summary Jurisdiction, and they usually have a chairman with legal experience. The larger boroughs have their own Quarter Sessions, and then the only judge is a Recorder, who is a practising barrister appointed to the office by the Crown on the recommendation of the Home Secretary.

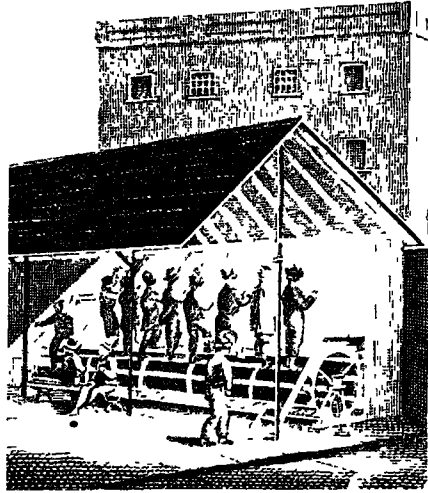
#### The Assize Courts

At the Assizes, which, as we have seen have a civil, as well as a criminal jurisdiction, the judge is a judge of the King's Bench Division of the High Court. In criminal cases he is sometimes called the "red judge" from the colour of the robes that he then wears.

The judge at a criminal trial, according to English practice, is much in the position of an umpire. In this our criminal procedure differs radically from the inquisitorial conception of the judge's function which is generally adopted in Continental countries. On that view the judge is a public officer charged with the duty of discovering the truth. It may sound a paradox, but in English Law it is not the judge's function to discover the truth, he is there to see that the rules are observed, and that both sides have, so to speak, fair play—the truth will be known when the jury give their verdict. The prosecutor's duty, too, is to help the jury to find the truth. He does not represent a client, as an advocate does in a civil case; he represents the public interest, and he must not fight to secure a verdict of guilty. His duty is to present the case against the accused for what it is worth, but never for more than it is worth, and to see also that anything that might tell in the accused's favour is not overlooked through any incompetence in the way in which his defence is presented.

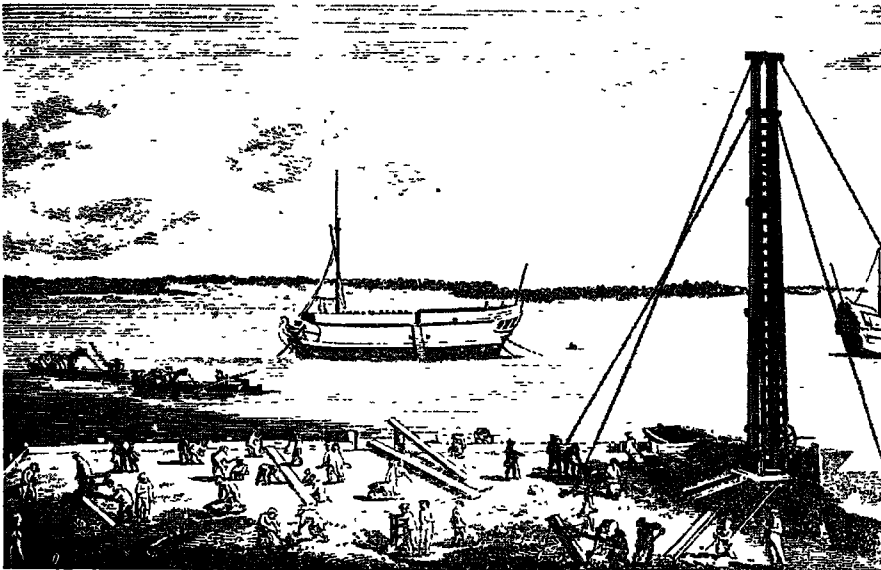
#### Rights of Appeal

From Quarter Sessions or the Assizes the accused, but not the prosecutor, may appeal to the Court of Criminal Appeal which is constituted by not less than three



#### PAST TREATMENT OF THE CRIMINAL

*Crime and its punishment have varied from century to century. The stocks, which goes back to Saxon times, is a mild discomfort compared with the savage tortures formerly perpetrated in the name of law or religion. The treadmill (right) was introduced as a means of penal discipline in 1818, and continued in use until 1901. The eighteenth-century print photographed below shows the "hulks"—old vessels in which convicts were confined at night while they laboured on shore during the day. The idea of reforming criminals was an innovation of the nineteenth century; before that time "the laws of England were written in blood."*





#### TRIAL SCENE AT

*A contemporary drawing of the Old Bailey made while a trial was in progress. It is interesting to compare this with the Rowlandson print of the earlier building (p 138)*



#### THE OLD BAILEY

*The Central Criminal Court (the name Old Bailey is one inherited from the earlier criminal court which stood on the same site) is the Assize Court for the London area*

judges of the King's Bench Division, sitting in London and without a jury. If the Attorney General certifies that a case involves a point of law of exceptional public importance, then there is a further appeal to the House of Lords.

#### Appeal to the Lords

The House of Lords is the highest court, both in civil and criminal matters, not only for England, but for Scotland and Northern Ireland also. Its criminal business is quite exceptional, but civil appeals can be taken to it from the Court of Appeal, by leave either of that court or of the House itself. When the House sits judicially to hear appeals, it is, in the theory of the constitution, the same body as when it sits as the Upper House of the legislature, but today, no unqualified peer would dream of exercising the legal right which he still has to take part in the judicial business. The only peers who then sit are those who hold or have held high judicial office, and the bulk of the work is done by the Lord Chancellor and nine Lords of Appeal in Ordinary, the Law Lords, professional judges who hold life peerages.

#### Appeal from Overseas Courts

To complete this catalogue of the courts, a very exalted court which stands outside the ordinary system must be mentioned, the Judicial Committee of the Privy Council. When the Long Parliament abolished the Star Chamber in 1641, it thereby took away the right of the Privy Council to hear appeals from English courts, but it did not touch the right of appealing to the Council from the overseas possessions of the Crown which were not then very important. The Council, therefore, is still the supreme court of appeal from courts overseas except in so far as its jurisdiction has been curtailed by legislation, as we shall see it has been in some of the Dominions. It acts now in virtue of an Act of 1833 through a Judicial Committee the members of which are privy councillors who either hold or have held high judicial office, and most of the work is done by the same judges as sit in the House of Lords, acting here however, not as peers, but as privy councillors. The

Committee has one special jurisdiction which associates it with the English courts, in time of war it is the highest court for the whole of the Empire in naval prize cases.

This description of the courts may have revealed one curious feature about the English legal system, the very small number of full-time professional judges who are engaged in working it. There are between a hundred and two hundred of them in all and it has been possible, therefore, to secure an extraordinarily high standard of integrity and ability. That is doubtless one reason why the English have not hesitated to entrust to their judges the great influence on the development of the law which the system of case law, which we must now consider, gives them.

#### Past Decisions as Precedents

The following of precedents is a practice which grows up naturally in any system of law, for when a point of law has been decided by one court and the decision and the reasons for it are brought to the notice of another court which has to decide the same question, the second court will naturally and properly give serious consideration to the decision of the first, and at least will not lightly differ from it. Obviously, litigants would never know where they stood if points of law, however often they might have been decided in the past, were always liable to be treated as new and undecided questions. The peculiarity of the English practice is that a single decision is a binding authority. It is a *source* of law and not merely something which may help a later court to make up its own mind and which it may disregard if it does not agree with it. Thus in English practice a court is absolutely bound by the decision of a higher court whether it agrees with it or not, and it will nearly always follow that of a court of equal standing with itself, and in some cases is bound to do so. In fact, so rigid has the system become that the House of Lords holds that it is itself bound to follow its own previous decisions.

These rules about the authority of precedents not only apply when a court has to decide some question of Common Law or

Equity, since these parts of the law are, as we have seen, purely judge-made, some practice of the sort there would be natural enough. But precedents are just as powerful when a court has to interpret the text of an Act of Parliament, if a previous court has decided that some section of an Act has such or such a meaning: another court may be bound to say that that is the meaning even if the second court thinks that Parliament really meant something else. Some of our older Acts of Parliament have almost been buried beneath accumulations of case law in this way. It is not surprising that foreign critics have sometimes stigmatized this English reverence for decided cases as sheer superstition.

The great merit of case law, however, is that it goes far to ensure a correspondence between the growth of the law and the changing facts of social life. All legal principles have to be formulated in general terms, but facts are always particular, and the danger of rigid or premature generalizations is that they may later have to be applied to facts which they were never intended to cover. In a case law system no generalization is absolutely final, there is no sacred text which places a legal principle beyond the range of argument, there is always the possibility of qualifying a provisional formulation of the rule in the light of experience of its working.

#### Freedom for the Judge

For judging is never an automatic process and no code or other device can make it so. There is always a certain sphere, sometimes greater, sometimes less, within which the law inevitably leaves the judge free to select the factors in the case which are to determine his decision, and in exercising this discretion he cannot but be influenced by the trend of sentiment in the society of which he is a member. A case law system recognizes this need for elbow room for the judge and by making his decisions a source of law it ensures that he will, almost without knowing it, lead the law along the lines of development that experience, rather than logic, commends to him.

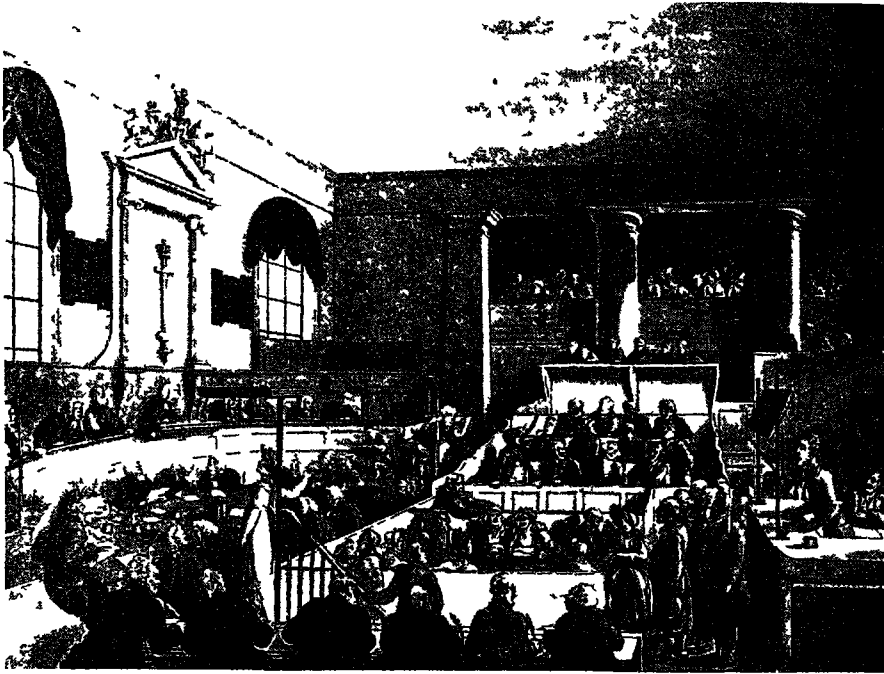
On the other hand there are certain

dangers in the method, especially in the extreme form in which it has been adopted in English law. Sometimes it is not easy to be sure what exactly a case has decided, sometimes precedents of equal authority turn out to be in conflict, and sometimes an unfortunate decision may perpetuate an anomaly or an injustice in the law for years or even generations. In this latter event from a desire to avoid following a precedent which it does not like, a court may be tempted to "distinguish" it, as lawyers say that is to say, to find some difference between the precedent and the case before the court which less subtle minds may find it hard to see, and thus the law may be cumbered with a distinction which ought not to be needed.

#### Possibility of Law Reforms

These disadvantages of case law could be reduced in two ways. Firstly, the English rules, which are mostly a development of the nineteenth century, might be made less rigid. The House of Lords might release itself from the fetters it has imposed upon itself and hold itself free, as the Supreme Court does in the United States, and as, in the English system, the Privy Council does, to correct its own mistakes, and the lower courts might assume more freedom to disregard decisions which experience shows have led to an unfortunate state of the law. Secondly, Parliament might be induced to take a more active interest in law reform.

At present however, Parliament is hard to move. From time to time it does wake up and introduce some useful change, but its interest is spasmodic and there is no pressure of public opinion to sustain it. It should be the business of someone perhaps of the judges, to bring to the attention of Parliament, or of some body to whose advice in the matter Parliament would be disposed to listen, defects in the law as they are revealed in the business of the courts. Too great reliance upon decided cases as an instrument for the development of the law makes that development depend too much on chance, there are many questions, on which the layman quite reasonably expects that the



#### THE JURY LISTENS

*The famous criminal court, the Old Bailey, is seen here in the nineteenth century through the eyes of Rowlandson and Pugin, in whose "Microcosm of London" the print appeared. The Old Bailey is now the popular name for the Central Criminal Court of London, and the present building was erected between 1902 and 1905.*

lawyer should be able to give him a definite answer, which remain uncertain merely because no litigant has yet happened to bring them for decision before the courts.

This is part of the price that must be paid for the unbroken continuity of the growth of English law, which in most respects has been so fortunate for the English people. It has meant that there has never been any occasion for a thorough overhaul of the law with a ruthless cutting away of anomalies and inconsistencies and unnecessary technicalities.

Another feature in the English system which has tended to keep the law in touch with life is the use of the jury. In the early days when the judges went round the country they used to summon the leading men of the neighbourhood to inform them of local crimes and other events which

needed their attention. These early jurymen were therefore more like the modern witnesses than like the modern jury; they spoke of what they knew themselves. The function of a modern jury, on the other hand, is to find the facts of a case by hearing the evidence of others, and it is a positive disadvantage that it should have heard anything about the case before the trial begins.

It was a long time before juries acquired their modern independence. Until the end of the seventeenth century they were liable to be punished if they gave a verdict which the government or the judges thought perverse. But in 1670 the famous William Penn and other Quakers were prosecuted for preaching in the streets, and the jury, having found them not guilty of unlawful assembly, were committed to prison by the

judge They were released on a writ of Habeas Corpus, and it has ever since been the law that juries are not responsible for their verdicts

Trial by judge and jury is the traditional form of a trial at Common Law both in criminal and civil cases In days when criminals were liable to be savagely punished for comparatively venial offences, as they were until about a century ago, juries could and often did mitigate the severity of the law by refusing, in defiance of the evidence, to return a verdict of guilty when their sympathies were roused in favour of the accused No doubt they would do the same today if they suspected that the criminal law was being used as an instrument of oppression, and there is an almost universal feeling that in criminal trials at least, the jury is a safeguard which must certainly be retained

#### Judge and Jury

Opinion is divided about the merits of the civil jury Where the good name of a party is at stake in a civil action, as it is, for instance, in libel, or when fraud is alleged, the arguments for retention are almost as strong as in criminal cases But Equity got on very well without juries, and in ordinary civil proceedings their tendency to side with the under-dog, valuable when a man's life or liberty or reputation is in issue, is out of place When two parties are disputing about their legal rights, the under-dog is not always the more meritorious, and even if we think that mercy should sometimes temper justice, sentimentality—and juries are often sentimental—ought not to Moreover, the facts and the arguments in a civil action are often so complicated and lengthy that the ordinary jurymen simply cannot follow them intelligently The presence of a jury also adds to the length and therefore to the expense of a trial For such reasons as these there has been a tendency in recent years to reduce the role of juries in civil cases, though there are some critics who think that the process has gone too far

The independence of judges came rather later than that of juries Judges have always been appointed by the Crown, and in

Stuart times they were sometimes dismissed when they gave decisions which a king did not like But in 1700 the Act of Settlement enacted that the king might only remove a judge of the higher courts on an address from both Houses of Parliament, and no English judge has been removed since that date Besides this statutory security of judges in their office, the method by which English judges are appointed has provided, almost by accident, another safeguard of their independence In most other countries judges start their judicial career at an early age in subordinate positions and gradually work their way up the ladder of promotion Necessarily, therefore they must look to the government, or possibly to popular election,\* for advancement and a weak man may be tempted to put the favour of those on whom his prospects depend before his judicial duty In England, on the other hand, a judgeship is the crown and not the starting point of a lawyer's career Judges are appointed, generally in later middle life, from among the leading members of the Bar, and to accept the position nearly always involves a reduction of income

Once appointed, a judge not only has nothing to fear, he also has little to expect from the government, for County Court judges are rarely promoted to the High Court and promotion from the High Court to the Court of Appeal or the House of Lords, though it may add something, does not add much, either to the dignity or the income of a judge It is a matter of common knowledge that judges on the whole, so far from being subservient to government, tend to be critical of it, and to regard themselves as the watchdogs of the ordinary man against anything savouring of bureaucratic tyranny

#### Costliness of English Law

English law has one great defect for which it is hard to find any excuse it is extremely costly The whole question of the costs of litigation needs examination, for there are many contributory causes, each of these needs to be considered separately before changes are made, for the costs of law, as of other things, are generally related to the quality of the article, and



cheaper law might easily be bad law. It is fair to add that there are many means by which costs can often be reduced if litigants or their advisers care to use them; that there are provisions for giving legal aid to poor prisoners, and that many lawyers generously give advice free of cost to the poor. But these are only alleviations of an indefensible state of things, which too often reduces to an empty formula our boast that in Britain there is only one law for rich and poor alike.

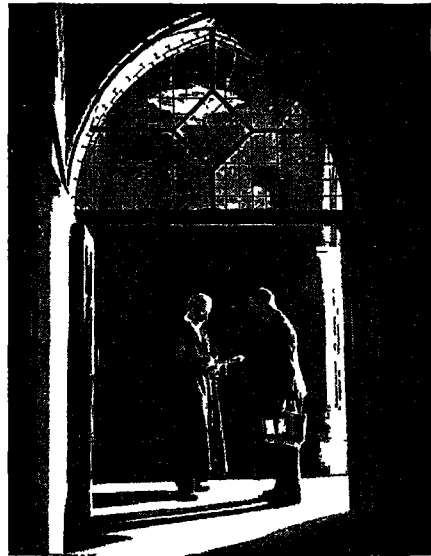
#### Individual Approach

Perhaps the most deeply rooted quality in English law is its preference for dealing with the case in hand as an individual problem rather than as an illustration of a general principle. The case law system is one illustration of this tendency, which is, however, a national characteristic not peculiar to the law. Englishmen are not illogical, as they are sometimes accused of being, and as they sometimes foolishly boast that they are. But they are very conscious of the extreme complexity of the facts of life, and they hesitate to make generalizations unless they are quite sure that all the relevant materials are before them. When the courts construe a statute they do so very strictly; they do not speculate upon what Parliament might have said if it had had in mind the case which has now arisen; they ask whether what Parliament did say does or does not cover the case.

So, too, in interpreting a precedent the courts try to isolate what lawyers call its *ratio decidendi*, the reason which actually induced the previous court to decide in the way it did, from other remarks that may have been made in the course of the judgment, and they are chary of expressing their own conclusions in terms which go beyond what is necessary for the case before them.

This concentration on the particular case has tended to give to the courts a markedly individualistic approach to social problems. Their first concern is to offer a remedy when the right of a party before them has been infringed, and to protect him against the arbitrary exercise of power, whether from other individuals or from the Government.

This tendency has served England well, for much of the history of English liberties is written in decisions which the courts have given in individual cases which have come before them. No doubt legal rights may be anti-social, or new conditions or trends of thought may make them seem so, but when that is so, the courts would hold that the remedy ought to come from an alteration of the law and not from a refusal by the courts to enforce it. On the whole this is sound doctrine, though in an age of collectivism we may not always be satisfied with its results. Law must always aim at a balance between the interest of the individual and that of the state, and if English law, or at any rate English courts, sometimes lean too much in favour of the individual, that is at least less dangerous than the opposite tendency. The sovereign Parliament is always free to redefine the individual's rights if the public interest so requires; that, in fact, is what the progress of the social services is constantly leading it to do. All that the courts say is that



#### BARRISTER AND SOLICITOR

*Only a barrister may appear in the superior courts. Above, a barrister, with his instructing solicitor, is seen endorsing a brief outside one of the courts*

whatever rights the law allows a man, they will maintain in their full extent

Notwithstanding this concern of the law for the individual and his rights, it has not hitherto provided him with the satisfactory means of redress in proceedings against the Crown. In the theory of the Constitution the courts were the courts of the king, and they could therefore not entertain proceedings against him even in his non-personal capacity. But this has long been an indefensible archaism, though in practice there were alleviations of the rule which made it in most cases more a matter of procedure than of substance. For instance, for a breach of contract the individual might have a petition of right, though in theory this was a matter of grace

and not of right. For a tort he had no direct remedy, for according to the old adage the king could do no wrong, but he could sue the servant of the Crown who had actually committed the wrongful act, and it would be no defence for the latter to plead that he had acted in the service of the Crown. Then, if the action succeeded, and if, in the views of the Crown's advisers, an ordinary employer in like circumstances would have been liable for the servant's tort, the Crown, without being legally liable to do so would satisfy the judgment. These anomalies, however, have been abolished by the Crown Proceedings Act, 1947, which has now placed the Crown in most respects in the same position as an ordinary litigant.

### Test Yourself

1. What is the origin of the Common Law?
2. What are the two great systems of law from one or other of which have sprung the laws of all the countries of western European civilization?
3. What is the relation between Equity and Common Law?
4. What is the underlying principle of the "trust"?
5. Name the divisions of the High Court.
6. What is the difference between a court of Quarter Sessions sitting in county and one sitting in a borough?
7. Define the function of a judge at a criminal trial.
8. What is our highest court for both civil and criminal cases?
9. Why has our law never been codified?
10. Since when have juries not been held responsible for their verdicts?
11. How does our Constitution secure the independence of the judges?

*Answers will be found at the end of the book*



#### UNCONSCIOUS OF DRAMA

*Successful police work often depends on speed in getting into action. The radio car has become a commonplace and the facilities of modern science are freely used to get quick results. In the picture above a searchlight is focused on the scene of a crime to enable police officers to search in the vicinity for clues while the trail is hot.*

## THE JURISDICTION OF MAGISTRATES

FEW people realize how large is the part played in the administration of English law by the magistrates' courts, the Courts of Summary Jurisdiction, as they are sometimes called, because the magistrates' powers come from the Summary Jurisdiction Acts, or Courts of Petty Sessions, to distinguish them from the Courts of Quarter Sessions which have been mentioned in the preceding chapter. In the year before the Second World War about eight hundred thousand persons in England and Wales were found guilty of offences of various kinds, and of these over ninety-nine per cent were dealt with summarily by the magistrates and less than one per cent were sent for trial by a jury at all the Assizes, including the Central Criminal Court (which takes the place of Assizes in London and is commonly called the Old Bailey), and all the Quarter Sessions of the country put together.

Of these cases, what may be called actual crime accounted for only about ten per cent. The remainder consisted, for the most part, of comparatively minor offences, such as breaches of local by-laws, police and traffic regulations, offences under the licensing acts, and a hundred and one other matters which could scarcely be regarded as criminal except in a technical sense. Nevertheless, these figures prove how vitally Courts of Summary Jurisdiction affect the social life of the people. Every citizen should understand their functions, jurisdiction and procedure.

### Magistrates and Their Origin

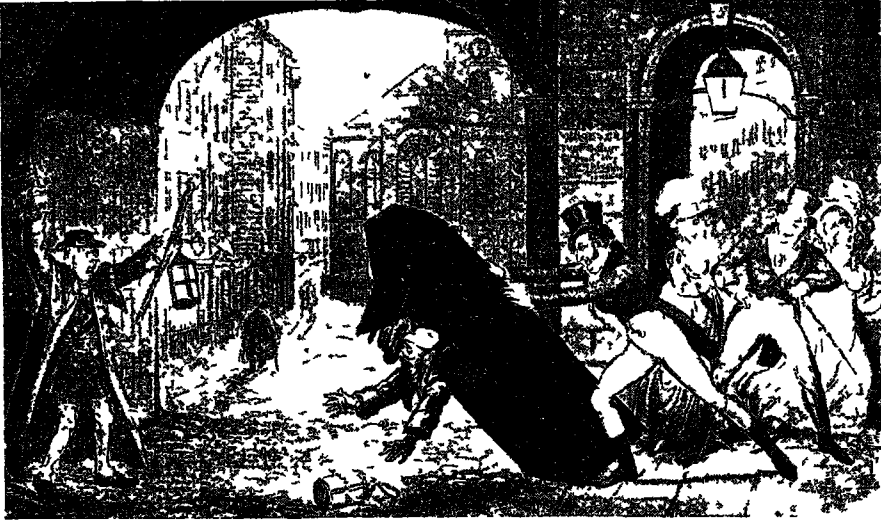
Let us look first, then, at the magistrates themselves. They are of two kinds "stipendiary" or professional magistrates in London and certain other large cities, and "lay" magistrates or Justices of the Peace elsewhere throughout the country. Both have the same jurisdiction, except

that a stipendiary, who must be a barrister of at least seven years' standing can try cases single-handed, whereas it takes at least two lay justices to constitute a court. On the other hand, the justices, unlike the stipendiaries, need have no legal training or judicial experience. This means that in practice lay justices are often dependent on the guidance of their clerk, usually a local solicitor, on questions of law or evidence. The system has its roots deep in history, and however indefensible it may be in theory, in practice it works reasonably well.

Tradition and sentiment play a large part in the retention of the lay magistrate, for the office is one of the oldest in the country, although until the reforms of the last century he was first and foremost a policeman rather than a judicial authority.

His ancestry goes back to the twelfth century when certain knights became known as "peace wardens" or "conservators" of the peace. It was their duty to see that a requisite number of adult males were adequately armed and held in readiness to keep the king's peace. As time went by the powers of these knights were extended to include judicial as well as executive functions, but even as late as the middle of the eighteenth century the great Sir John Fielding was more a commissioner of police for the metropolis than a metropolitan magistrate.

Indeed it is because in the old days the magistrate exercised a direct control over, and was responsible for, the maintenance of a police force that the magistrates' courts have been known as 'police' courts. Nowadays the title is mischievous in that it wrongly suggests that in these courts the police have some special status or influence they do not possess elsewhere. The police, however, are there in a purely executive capacity, and they have no more



#### NIGHT WATCHMEN AND TIPSTAFF-MEN

*Long before the introduction of Peel's police force in 1829 there were, in England, various systems of policing the thoroughfares of the great cities. The watchmen were ridiculed even in Shakespeare's time and their efficiency did not increase in later years. However, the eighteenth century saw the introduction of the Bow Street runners, who worked in co-operation with the police officers. Above, Cruikshank shows young bloods enjoying themselves at the expense of the old night watchmen, known as "Charleys," and, below, the new law officers raid a nineteenth century gambling house.*



to do with the administration of justice than in any other court.

Nevertheless, the police are necessarily more in evidence in the magistrates' courts than elsewhere because it is they who are charged with the duty of bringing offenders before the court. Also, they often undertake the conduct of the prosecution unless the charge is sufficiently grave for counsel or solicitors to be employed, a practice which, though it may be economic and convenient, is nevertheless open to objection. To say this is no reflection on the police, but merely a criticism of a wrong system. The life training of a policeman is to detect and catch criminals, and when he has placed the alleged offender in the dock he would be more than human if he did not desire to see him convicted. Indeed, in a sense, an acquittal is a reflection upon his previous judgment and actions or upon those of his subordinates. It is true that police officers often go out of their way to try and help the accused. But even so it does not alter the fact that in all but the simplest cases the system leads to a confusion of functions, and that the police have not always the training and experience to undertake this difficult task.

#### Modern Police Force

Taken as a whole, the police nowadays are a fine, humane body of men actuated by a real sense of responsibility and a strict code of honour. They have won and deserve the confidence of the public. Yet at first the formation of a police force was bitterly opposed. When Sir Robert Peel put forward the idea in 1822 of a trained body of men to take the place of the old Bow Street runners and street watchmen, whose gross incompetency and corruption were responsible for a growing wave of anarchy and crime, a committee of the House of Commons unanimously condemned the proposal. They did so on the grounds that it was "impossible to reconcile any effective system of police with the perfect liberty of action and freedom from interference which is one of the great privileges and blessings of society in this country."

Peel refused to be downhearted, for, as

he wrote to the Duke of Wellington, who was then Prime Minister "I am determined to teach the people that liberty does not consist of licence nor in the right to have their houses robbed or broken open by thieves"

Yet it was not until 1829, seven years later, that he was able to carry his Metropolitan Police Act into law

Even after that the suspicion was slow to diminish that the new police force was in some way an organization designed to oppress the working man

The authorities did all they could to dispel this absurd idea. The policeman was given the simplest of blue uniforms, he was armed solely with a wooden



"PEELER"—SOMEWHAT DANDIFIED  
*Since he was first regarded by the public as a danger to liberty, his uniform was designed to stress his non-military character—hence the top hat*



NEW SCOTLAND YARD

*Headquarters of the Criminal Investigation Department of the Metropolitan Police Force, established in 1842, Scotland Yard has a great reputation for the efficient solution of crime problems*

truncheon, and in order to complete his non-military appearance he was made to wear a top hat. This was particularly reassuring! Yet it was nearly thirty years before public feeling permitted the top hat to be replaced by a helmet.

At first the police were used exclusively for the prevention of crime, and it is only in recent years that they have been loaded with duties that have little relation to criminal activities. The coming of the motor car alone has brought into existence dozens of new offences, most of which have nothing to do with criminality.

#### The J.P.'s Day

The day's work in a magistrates' court usually begins before the public are admitted, for it is the duty of the magis-

trate to hear applications for advice on matters of personal or domestic interest, and these are dealt with in private. This is an important social service, for it means in practice that the legal advice for which the rich man has to pay counsel and solicitor is given to the poor man free of charge, and the magistrates' courts for this reason have been aptly described as the "Poor Man's Court of Justice." Anyone of limited means who cares to do so can receive this friendly assistance, and the applications are sometimes not devoid of pathos or humour.

For instance it is not easy to advise on the spur of the moment as to the best way of dealing with a neighbour who turns on the wireless in the morning and leaves it blaring the whole day even when the house is empty, or with one who breeds and rears noisy cockerels in the backyard. Most of the problems, however, are of a more serious nature and often raise questions of vital importance to the applicants—affecting the

safety of their persons or the security of their homes.

When applicants for advice have been dealt with there may be other applications for process of the court, warrants of arrest, summonses and so forth. These may be made either by the police or by members of the public, mostly of course by the police, and are not granted unless on the facts placed before him the magistrate considers there is, on the face of it, justification for the particular form of process applied for. Here again the magistrate has to exercise his discretion within certain well-defined principles.

After the applications are finished the court is open to the public, and the hearing of the day's charges begins. These may include all crimes great or small; for

no matter whether it be a grim and horrible murder, the petty theft of a packet of cigarettes, a gigantic fraud involving widespread ruin and disaster, or the playful result of a night's jollification, we have seen that it *must* come before the magistrates in the first instance, whether it be for the actual trial or merely for committal, after the preliminary examination, to one of the higher courts

In the more serious cases the police will probably only offer "evidence of arrest," that is to say, give a brief outline of their reasons for seeking a remand. Usually the accused will then be released on bail, but whether this is granted or not and on what terms is a matter that lies solely within the discretion of the court.

It is customary to ask the police whether they oppose bail, but an objection by the police is only one of the factors to be taken into account, there are others, such as the health or domestic circumstances of the accused, but the main point is that every person is presumed to be innocent until he is adjudged guilty. Bail, therefore, should not be refused unless there are reasonable grounds for believing that the defendant might not turn up to take his trial, or that if released meanwhile he might impede the police in their inquiries by intimidating witnesses or destroying important evidence.

#### "Guilty" or "Not Guilty"

It is only comparatively simple cases such as drunkenness, charges under the Vagrancy Acts, petty larcenies where the prisoner has been caught red-handed and so forth that can be dealt with at the first hearing. Apart from these, most of the morning is occupied with cases previously remanded in which the evidence for the prosecution is now fully available.

Unless the charge is one on which the prisoner is bound to be sent for trial by a judge and jury or he himself exercises his option to be so tried, he is called upon to plead "guilty" or "not guilty." If he pleads guilty then the counsel or solicitor for the prosecution or the police officer in charge of the case briefly outlines the facts and gives evidence as to the character

of the accused, his previous conviction, and so forth. But even then, more often than not, the magistrate does not feel in a position to pronounce sentence and a further remand is ordered, so that the probation officer, whose duties are more fully described later in this chapter, may interview the prisoner and make private inquiries as to his personal and domestic circumstances.

If, on the other hand, the accused pleads "not guilty" then witnesses are called to support the case outlined by the prosecution. Each in turn enters the witness-box and solemnly swears "to tell the truth, the whole truth and nothing but the truth," and sometimes, it must be admitted, proceeds immediately to do the exact opposite. There are occasions when one is inclined to wonder what is the exact value of the oath and whether it is any use continuing to make the taking of it an essential preliminary to the giving of evidence.

#### Taking Depositions

When the witness has been sworn, he gives his testimony, which is laboriously written down in longhand by the Clerk of the Court. If the case is "going for trial" these statements form the "depositions," each one being signed by the witness concerned and the whole bundle forwarded to the Assizes or Sessions. It is an archaic and tedious procedure which badly needs reform, especially as it is often clear from the beginning that the prisoner intends to plead guilty, in which event the depositions will probably never be looked at. Yet in a long and complicated case, hours, and even days, may be taken up with their transcription.

If the matter is one which is being tried summarily then the clerk also takes a note, but a less elaborate one.

#### Examination of Witnesses

Each witness is first examined "in chief" by the side which has called him, and then the other side will "cross-examine" him, that is to say, put questions for the purpose of checking his story, or bringing out facts which throw a new light upon it. A skilful cross-examination is one of the most



effective means of getting at the truth, but it is for the court to see that it is not abused. When counsel or solicitor are not present and it is only in the more important cases that they are, the court may have to undertake these duties itself, and this is one reason why it is desirable that the presiding magistrate should be a trained lawyer with a knowledge of the rules of evidence and acquainted with the purposes and limitations of both examination-in-chief and cross-examination. To do this and at the same time to hold the scales of justice evenly is not easy.

When the evidence for the prosecution has been completed the court has to decide (if the matter is one that cannot be dealt with summarily) whether there is a *prima facie* case against the defendant upon which he should be sent for trial. If so, he is formally committed to the Assizes or Quarter Sessions, unless before that is done he wishes to give evidence himself and call witnesses. If he does, then their testimony is also written down by the clerk and forms part of the deposition.

Should however, the case be one which the magistrates can deal with themselves, he is invited to make a statement from the dock or to give his testimony on oath in the witness-box, whichever he prefers, and to call any witnesses he desires in his defence the same procedure of examination and cross-examination being gone through. It is not until it has heard the whole of the evidence both for the prosecution and for the defence that the court should even begin to make up its mind whether to convict the accused.

#### Probation Officers' Inquiries

When the defendant has been convicted or pleaded guilty it is usually desirable to order a remand that is, to adjourn the case, so that the probation officer may complete his inquiries and the court be enabled to decide whether or not it is a suitable case for a probation order. Even if it is found not to be, the inquiries of the probation officer sometimes bring to light mitigating circumstances which would not otherwise be known and which materially affect the nature of the punishment to

be imposed. For this reason, quite apart from his own special work, the probation officer is able to give invaluable assistance to the court and play an important part in the administration of justice.

#### Courts Reflect Social Conditions

There is no place so sensitive as the magistrates' courts to any change in the social conditions of the people. Take, for instance, the question of drunkenness. Nothing has been more remarkable than the increase in sobriety of recent years, so far as the courts are any criterion. Gone are the bad old days when a daily list of forty to fifty such charges was not unusual in any urban area.

Nowadays drunks can be divided into two main classes: there are the old hands for whom there is little or nothing to be done except to enforce by imprisonment a short period of total abstinence, and those who are the victims of an occasional "binge," for whom a small fine and the disgrace of standing in the dock is generally sufficient punishment.

The excuses given by inebriated revellers to explain their condition are often not devoid of humour. "It was my grandmother's funeral", "My wife bullied me", "I happened to meet my mother-in-law", and the candid "I like beer" have all been heard from time to time.

Most of the charges, however, that are brought before a Court of Summary Jurisdiction are for dishonesty of one kind or another: simple larceny, embezzlement, fraud, housebreaking, and burglary. Crimes against the person and crimes of violence are extremely rare, which says much for the fundamentally law-abiding character of the British people.

The professional criminal, too, who has deliberately chosen a life of crime, is seldom encountered, and the "master crook" of the type beloved by readers of Edgar Wallace, "Sapper" and other thriller-writers is virtually non-existent. The vast majority of so-called criminals are criminals because they have not the brains or industry to be anything else or because of definite shortcomings in their environment or upbringing. It is this that

# SUMMARY JURISDICTION

## MAGISTRATES

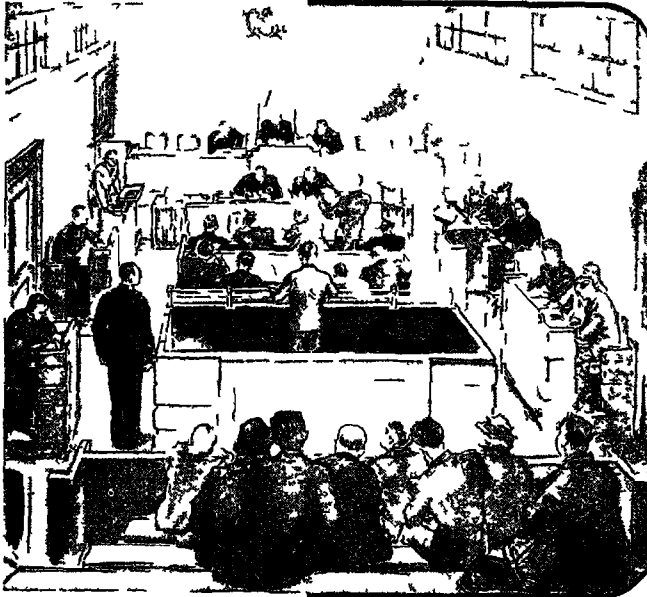


### STIPENDIARY

ONE TRAINED  
BARRISTER OF AT  
LEAST SEVEN YEARS  
EXPERIENCE

### JUSTICES OF THE PEACE

TWO OR MORE  
LAY MAGISTRATES  
ASSISTED BY THE  
CLERK OF THE  
COURT



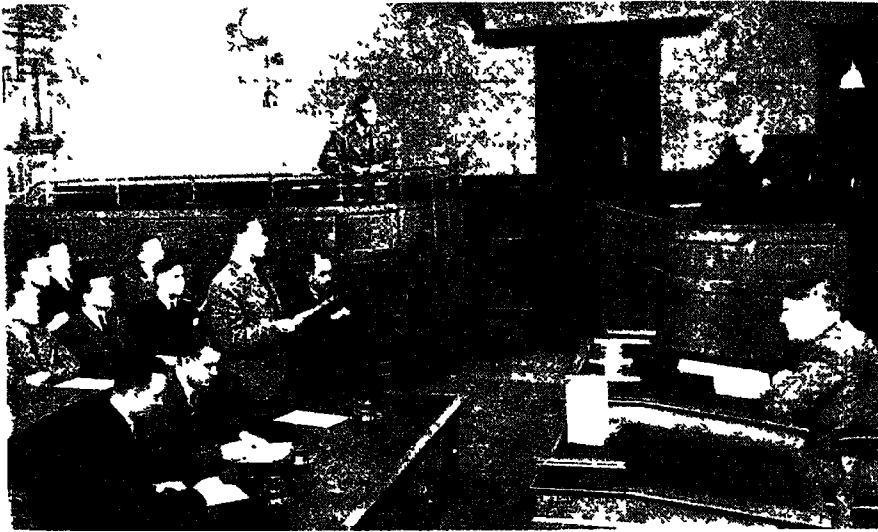
99%.

OF CHARGES  
DEALT WITH  
HERE GIVES  
ADVICE GRANTS  
SUMMONSES AND  
WARRANTS HEARS  
CHARGES AND  
SUMMONSES CIVIL  
AND CRIMINAL

1%.

OF CHARGES  
TOO SERIOUS FOR SUMMARY JURISDICTION AND  
DEFENDANTS THEREFORE COMMITTED FOR TRIAL AT  
**QUARTER SESSIONS BEFORE A RECORDER**  
OR THE **ASSIZES BEFORE A JUDGE AND JURY**

*The drawing of a Court of Summary Jurisdiction was made from the life. At the far end sit three Justices of the Peace, in the foreground, at the rear of the court, sits the general public. The defendant is in the dock and his solicitor is questioning a witness in the witness box to the left. Members of the Press are seen to the right.*



#### COURT PROCEDURE

*Here a group of police recruits is receiving realistic training in court procedure. They must understand how to present evidence clearly and how to question witnesses intelligently. Hours spent in court will be an important part of their careers.*

makes the question of what to do with them such a difficult problem for the courts to decide.

#### Laws of Evidence

In criminal cases the laws of evidence must always be strictly applied. They are not, as many people imagine, mere pettifoggish restrictions invented by lawyers in order to make things more difficult for laymen. They are founded on experience and have been gradually evolved as necessary to the administration of justice and for the protection of the public. No doubt their strict application has sometimes resulted in the acquittal of a guilty person, but on the other hand they have saved many innocent persons from being wrongly condemned. They have, therefore, a practical value, and whilst in civil cases they may be waived to some extent, in criminal matters they cannot be dispensed with even with the consent of the parties.

There are a few points relating to evidence which justices must constantly bear in mind. The first is that the onus of proof

is upon the prosecution. This means that no defendant is required to prove his own innocence; no matter how suspicious the circumstances against him may be he need not, unless he chooses, give any explanation whatever. The next point is that before any accused person can be found guilty there must be in him a wrongful mental condition which is the cause of the wrongful physical act or omission with which he is charged. Both the mental condition and the physical act must be proved before there can be a conviction under the criminal law. Then again, only such facts as are legally relevant can be produced in evidence, that is to say, only such facts as tend to determine the truth or falsehood of the particular issue which the Bench is endeavouring to decide. All other evidence is irrelevant and to be excluded from the hearing.

What is relevant and what is not is often a matter of some difficulty. Clearly the facts of the alleged crime are relevant and all circumstances which help to explain them. The prisoner's own acts are clearly

relevant, as well as any evidence to show his motives or want of motive. On the other hand, evidence of other offences may not as a rule be given, nor of any statement made by or to third parties when the accused was not present, i.e. hearsay. This is because the truth of such a statement cannot be tested by cross-examination, since the witness is not speaking of what he knows of his own knowledge but merely of what someone who is not before the court has said.

There are, of course, some offenders—habitual offenders and the like—for whom imprisonment is the only appropriate penalty, both in order that society may be safeguarded from further depredations and also as a warning and deterrent to others. But imprisonment should only be used as a last resort, and any alternative which is likely to provide the desired result, such as a fine or a probation order, is to be preferred.

But even if the offence is one that can be adequately dealt with by a fine, there are still many points to consider. For example, if fixed at too substantial an amount, it may, in the case of a poor man, inflict unmerited suffering on a number of innocent people—perhaps greater than would be the case if he were given a short sentence of imprisonment. Yet if the fine is adjusted strictly to his means it may be so small as to have little or no deterrent value.

#### Probation Officers

To hold a just balance in these matters is not easy, and a magistrate would often be groping in the dark were it not for the assistance and advice he receives from the probation officer. Indeed, the probation system has transformed and humanized the administration of justice to an extent that can only be described as revolutionary: it has proved an invaluable instrument for the prevention of crime, and has saved innumerable offenders from becoming hardened and professional criminals.

Like many other beneficent reforms, probation developed from the humblest beginnings. It began as long ago as 1876, when a working man named Rainer

sent a gift of five shillings to the Church of England Temperance Society, asking whether anything could be done to assist those who were repeatedly charged at the local court with drunkenness and similar offences. The society thought the idea a good one, and appointed a "missionary" to attend the court and to lend a helping hand to some of the down-and-outs in a friendly and unofficial capacity. As time passed others took up this admirable work, and gradually there evolved a widespread and recognized system of probation as it exists today.

#### How Probation System Works

Probation officers now have an official status in that many of them are appointed and paid, in part at all events, by the Home Office. But they are, nevertheless, an independent body of men and women, possessing no legal authority except such as is given them under a specific order of the court in an individual case. They owe their position to the Probation of Offenders Act 1907, and to various Home Office rules made thereunder. How far probation is used depends upon the particular judge or magistrate concerned, and there are still a few who have not much faith in it, but it is undoubtedly tending to play an increasingly important part in the administration of justice, particularly in the Summary Courts.

Of course it is important that those who are placed on probation should not be allowed to imagine they are being "let off." Rather must they be made to understand that what they are being offered, as the word implies, is a chance to redeem themselves. For this reason it is always desirable for the court to emphasize, when making an order, that if the probationer does not avail himself of the opportunity extended to him he can be brought back at any time and punished for the original offence by imprisonment or in some other way.

Much obviously depends on the personality of the probation officer. He must not only have a good technical training, but must also be a man of the world who understands the follies and weaknesses of



POLICE STATION CHARGE ROOM

*The charge room is one of the most important in any police station, for it is here that the accused man or woman hears the first formal charges which will lead to an appearance in the magistrates' court. After being charged the accused may be released on bail, but may, on the other hand, be detained in a cell until his case is heard.*

mankind; he must have a sympathetic nature which invites confidence and yet be able to show that he will not stand any nonsense or swallow any tale he may be told. He must possess infinite patience and never acknowledge defeat or regard any case as hopeless, he must be shrewd, tactful, and warm-hearted, and appreciative of the importance of his job without seeking to obtain from it any personal advantage or kudos. In a word he must be inspired by true missionary zeal and an inborn love of his fellow-men.

Broadly speaking, probation work may be divided into two parts: investigation and supervision. Upon investigation depends the selection of suitable cases, and on a wise selection depends the success of the system. For on occasion the mental attitude of the accused is such that the method would be hopeless. It has nothing to do with the gravity of the offence, for probation can be applied even to very serious charges if the case is one in which the offender on conviction is punishable by the court making a probation order. All kinds of factors, including especially domestic circumstances and background, have therefore to be taken into account, and the court should be guided not only by material but also by spiritual values. But, on the other hand, a wise and kindly probation officer can surmount most material obstacles provided he can break through the crust of resistance with which some offenders surround themselves when they are offered help.

A probation order is usually for twelve months, though it may be for any period up to three years. It may be unconditional or there may be conditions attached to it, such as that the probationer shall not change his place of residence without the consent of the probation officer, or that he shall refrain from association with persons of bad character, or with individuals named in the order. Such con-



#### POOR MAN'S LAWYER

*In legal terms a poor person is one qualified by lack of means to bring or defend a case without paying fees. To enable him to do so a solicitor or barrister may be appointed from a voluntary rota*

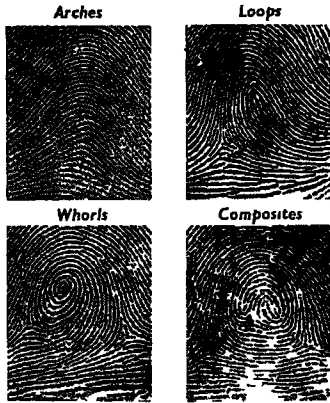
ditions are not only important in themselves but help to impress upon the probationer that the order is no mere empty formality, that his character is being tested, and that if he fails to run straight or breaks the conditions he will be punished for his offence. In other words, he must be made to understand that binding over on probation is really a postponement of sentence on conditions. If these conditions are not obeyed or if he is unresponsive and disobedient then he must expect to suffer the punishment which otherwise he would have received in the first instance.

#### Appeals

There are few appeals made from magistrates' decisions, and of these an even smaller number succeeds, which is some proof of the meticulous care with which cases are generally heard. With very few exceptions there is no appeal from the dismissal of a case, but since 1914 an appeal from a conviction has been allowed whenever the accused "did not plead guilty or admit the truth of the information"; and since the Criminal Justice Act 1925 there may even be an appeal against sentence.

The appeal goes to Quarter Sessions and

# SCIENCE FIGHTS CRIME



*The system of establishing identity by means of fingerprints is now used extensively. Types of fingerprints are scientifically classified and those of all convicted criminals*

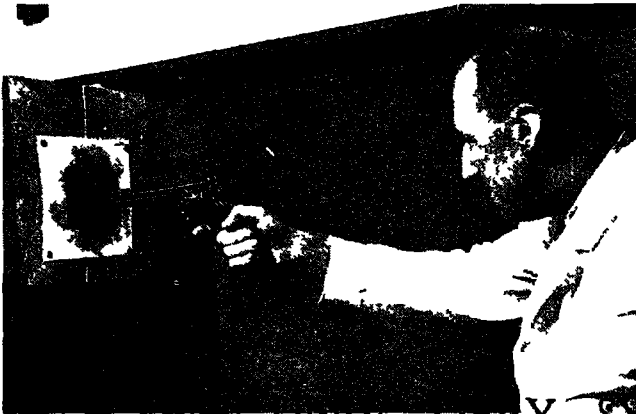
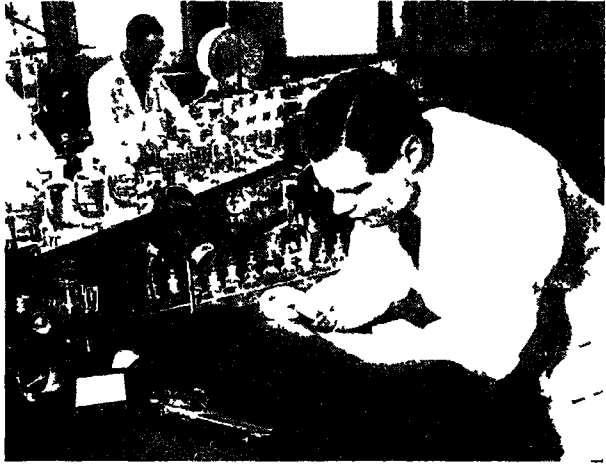


*are recorded at New Scotland Yard. Above, latent fingerprints are revealed by specially prepared powder. The experts are able to tell at a glance in which category a fingerprint should be classified. On the left, officers compare, by means of a projector*

*a recorded fingerprint with one found at the scene of crime. Nothing is left to chance—proof is needed from the laboratory. Right, a chemist makes a test for blood-stains on a knife that may have been used in a stabbing case.*

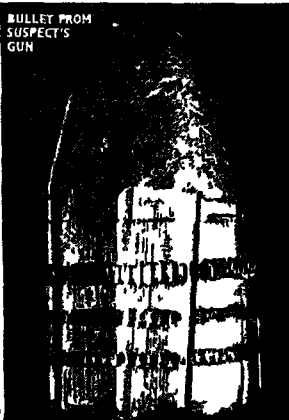
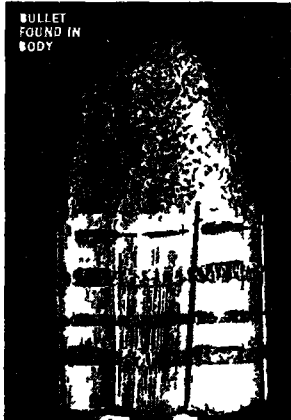


Forensic science becomes increasingly important in the handling of the complex problems of modern crime. In a case of shooting the ballistics experts are called in. On the right a chemist is seen analysing gunpowder stains on a victim's coat from these he will be able to estimate the range at which the gun was fired. Every gun-barrel leaves its own particular traces on the bullet it fires. Below, a suspect's gun is being fired by an expert.



The bullet will be carefully preserved and photographs of it and of the bullet found on the scene of the crime will be made. By fitting upper and lower halves of the two photographs together the rifling marks will be seen to coincide. The pictures below give a clear idea of the process, and of the results of the comparison.

DEPT. UNIV. LIBRY. SYSTEM





the order or sentence is suspended until the appeal is heard.

When the appeal is heard, the Appeal Committee of Quarter Sessions in a county, or the Recorder in a borough Quarter Sessions, may either confirm the decision of the magistrates or reverse or vary it as they think fit. They may even increase the sentence or penalty to any extent that the magistrates might have awarded in the first instance, so that the appellant, in the event of a frivolous appeal, runs a definite risk.

Nearly half of all the cases in many Courts of Summary Jurisdiction are directly or indirectly concerned with motor cars exceeding the speed limit, passing traffic lights, obstruction, and other more serious offences such as dangerous or careless driving or being in charge of a motor car when under the influence of drink. One is sometimes inclined to wonder what the police had to do before the motor car was invented.

Other matters to be dealt with in any average day's work cover a wide field. There may be offences under the Vagrancy Acts, begging, obstruction by street traders, assaults—many of them between women who have not yet learnt the great art of being more neighbourly—frauds against the railways, such as travelling without a ticket and the like, offences under the Emergency Regulations and under local by-laws of one kind and another. In fact, the whole range of human activity comes under the magistrates' survey and may bring the citizen into conflict with the law.

#### Civil Work

When the charges are disposed of the court proceeds with its quasi criminal or civil work. This is even more varied than its criminal jurisdiction, as summons may be issued under literally hundreds of Acts of Parliament, Statutory Orders, local government by-laws, and the like. Many of the matters to be dealt with are of a routine character, such as arrears of income tax, rates, gas and electricity. Here there is nothing to be done but make a formal order for payment. Before, however, any steps can be taken to enforce it by com-

mittal to prison there must be a further application to the court. When this happens what is called a "judgment summons" is issued and evidence must then be produced that the defendant is refusing to meet his liabilities although in a position to do so.

It is often difficult to obtain reliable information of a debtor's financial position, and mistakes are bound to occur. Some people, too, deliberately take advantage of the alternative which the law allows them and choose to go to prison instead of making the payment which the law has ordered. Particularly is this so in wife maintenance cases, for defaulting husbands are too often willing to liquidate their liabilities towards their wives and families by spending a few weeks in prison. In this respect the law badly needs amendment. A term of imprisonment, after all is imposed for wilful refusal to obey an order of the court. It ought not to be used as a means of discharging the debt itself.

#### Matrimonial Cases

Other business may include an application for an affiliation order by a woman seeking to compel the putative father of her illegitimate child to pay for its support, and Courts of Summary Jurisdiction have no more difficult task than in dealing with such cases.

Or again, there may be cases to be dealt with under the matrimonial jurisdiction now exercised by the magistrates' courts. This branch of work is increasing so much that in some courts, especially those serving busy residential areas, one or two afternoons a week have to be set aside for it, and at least sixteen thousand cases pass through the courts every year, that is to say, four to five times as many as are normally dealt with by the Divorce Court. Yet, like so many aspects of summary jurisdiction it has all come about in a somewhat haphazard way, by accident rather than design.

As a result of numerous Acts of Parliament, magistrates' courts now possess powers to deal with matrimonial cases so wide indeed as only to stop short of actual

divorce. An Order of Judicial Separation can now be obtained summarily by a wife against her husband for adultery, persistent cruelty, or desertion, neglecting to provide reasonable maintenance, assault, habitual drunkenness and on several other grounds as well. The husband may also obtain relief where the wife is an habitual drunkard or drug addict or has been guilty of adultery, or persistent cruelty to his children.

In practice, what generally happens is this. A woman—and the vast majority of applicants are women—arrives at the court full of complaints and indignation against her husband. If she desires to see the court missionary he is at her disposal, if not, and no compulsion is put on her to do so, she goes straight to the magistrate and makes her application for a summons on one of the grounds mentioned above.

In nine cases out of ten, however, she pours out her troubles first of all to the missionary. He then invites the husband to come and see him and have a private talk. This conciliation procedure is something quite novel, and the law, as such knows nothing about it.

#### Conciliation or Separation

Of course, conciliation cannot succeed in every case, especially if the parties have been married a number of years. Then the iron may have eaten too deeply into their souls, the incompatibility may be too pronounced, and it is no part of a magistrate's duty to try and force couples to live together who would obviously be better apart.

"I think the best thing you can do is to return to your wife," said a magistrate to one such husband. "Yes, sir, and what is the next best thing?" was the gum reply. On the other hand, there are many younger couples who have married in haste and have repented in haste as well, with the result that one or other of them rushes off to the court. Then the chances of a fresh start are brighter, and the magistrate or court missionary may be able to help them smooth out their differences.

Matrimonial cases are now heard in camera, and every effort is made to create an atmosphere of friendly informality. The

parties are encouraged to speak freely and without embarrassment. Then by gentle probing the magistrate tries to ascertain the real cause of the trouble. Generally the trouble is economic for there is not much doubt that want of means is the greatest single cause of marital unhappiness.

Here is a typical case. The parties were a young couple in the early twenties, the husband had deserted his wife and left home one Christmas Eve without any apparent reason. He had done it once before in their short married life and this time the wife came to the court. Questioned, the young husband refused to give any explanation, and there seemed no alternative but for the magistrate to make an order.

When however, he picked up the pen to do so the wife exclaimed almost breathlessly. "I don't want to lose him, sir, I don't want him to go away—I'm fond of him. I want him back." The magistrate turned to the young man and said, "You hear what your wife says. Do you really want to leave her and your child and break up your home?" He hesitated a moment and then blurted out, "She's always nagging me." "Oh! I don't mean to, sir," said the wife, "things are sometimes a bit difficult and I say something I don't mean." Gradually it all came out. The young husband was a decent enough fellow but was earning a pitifully small wage. It was a struggle to make both ends meet and this had led to constant wrangling. The magistrate asked the missionary whether he could help the man to get a better job, and fortunately he succeeded in doing so, and the couple are still together and are happy.

Of course, the problem cannot always be solved in this way. Sometimes what is needed is a few cooking lessons and a little instruction on how to lay out money to the best advantage. Many a home has been wrecked by constant tins of salmon and slices of cold sausage when an appetizing and decently cooked meal would have held it together.

When it is clear that conciliation is impossible the court can grant a judicial separation. But this unfortunately may

only aggravate the mischief, for it does not offer the chance, as does a divorce, of making a fresh start, and an income which will suffice for a husband, wife and children living together is often quite inadequate to maintain them when living apart. If the man is left with too little he will lose heart and cease to bother, and there will be summonses for arrears and the possibility of imprisonment if he is obviously recalcitrant, which generally means that the wife gets nothing. If, on the other hand, the wife receives too little she may not do justice to herself or the children and may develop into a slut.

It has been suggested that the Summary Courts should be given the power to grant divorce. Provided that the court is presided over by a chairman with legal training and experience, this might prove a useful reform, although the need for it has been reduced recently by an extension and cheapening of the procedure in divorce cases. The issues to be tried on a divorce petition are often identical with those considered by magistrates in making a separation order. It can scarcely be argued, therefore, that the magistrates' courts would be incompetent to deal with such matters, for many of them are already doing so every day.

#### Juvenile Courts

Juvenile delinquency is another matter which presents the magistrates' courts with many delicate and difficult problems. It is a disturbing fact that even before the war no less than half the serious crime of the country was committed by adolescents under the age of twenty-one.

In recent years both the legislature and enlightened public opinion have begun to pay a great deal of attention to this vital matter, and the passing of the Children and Young Persons' Act of 1933 marked a definite advance. This Act was responsible for the setting up of Juvenile Courts all over England and Wales, such as already existed in a few localities to which young people under the age of seventeen could be sent.

Special rules were laid down as to their procedure and composition. It was pro-

vided, for instance, that a Juvenile Court should consist of not more than three justices chosen from a special panel of those especially qualified by age and experience for dealing with juvenile cases. Every effort was to be made to get away from the atmosphere of a criminal court and to segregate young delinquents from corruptive contacts with older and more hardened offenders. So far as possible the Juvenile Court was not to be regarded solely or even primarily as a criminal court at all, and when possible it was to be held in some room away from the ordinary court building.

#### Judgment and Punishment

At the same time magistrates called upon to sit in a Juvenile Court should not allow their judgment to be clouded by excessive sentimentalism. Many of these juveniles are fairly hardened young criminals who need a firm hand in their own interests as well as in those of the community at large.

How then should they be dealt with? No doubt probation, if wisely and generously used, has much to be said in its favour, but there are many cases in which sterner methods are required.

Imprisonment can generally be ruled out. What then remains? Sometimes a fine may be the best way of teaching the necessary lesson to a lad who has misbehaved himself, but only where he is a wage-earner and is likely himself to feel this curtailment of his pocket money. But in many cases even this may not be possible, the lad may be out of work, or his earnings may be so small as to leave him little or no margin either for pleasures or penalties. Furthermore, he may be contributing most of his income to the upkeep of the home and the real burden may fall, therefore, upon his family. To all these considerations the court is bound to give careful scrutiny before inflicting a monetary penalty.

There is the alternative punishment of the birch if the boy is under sixteen, but most magistrates have not much faith in the efficacy of this as a permanent reformative influence. Prompt chastisement at the hands of a parent or teacher may often



#### PROBLEM OF THE YOUNG OFFENDERS

*Introduced in 1908, Juvenile Courts were designed to prevent young offenders from being contaminated by legal processes and prison life. The picture above is a reconstruction of a scene in such a court from the Crown Film Unit film, "Children on Trial." The chairman is the well-known children's magistrate, Mr. Basil Hemiques. Proceedings are informal, but the young offender is not allowed to lose sight of the seriousness of his position.*

have excellent results, but a judicial whipping in cold blood long after the offence was committed is quite another matter.

Opinions differ, but the fact that of the boys who have been birched, so many sooner or later—and very often quite soon—commit another offence and come again before the court shows that for them at least the punishment has not had the deterrent effect hoped for. Some boys do not much fear a beating, and after it they are often regarded as heroes by the rest of their clique. Others more sensitive suffer a sense of degradation and are left with an intense rankling resentment which may be the basis of a definitely anti-social attitude. For others, no doubt, the physical pain of a whipping does act as a deterrent, but the memory of it soon fades, and there

is always the hope that next time they may not be caught. The objections therefore to birching are not sentimental but practical, based on evidence that, except in rare cases, it is not effective and that, if used in the wrong cases, it may have the worst results. For this reason it is proposed in the Criminal Justice Bill of 1948 to abolish corporal punishment altogether.

#### Borstal Institutions

But if so, what other alternatives are there? Often it is clear that the best hope of reforming particular boys or girls lies in their removal for a time from their present environment. This may be done in two ways. They may be committed to a Home Office school, or, if over sixteen, but under twenty-three years of age, may



A BORSTAL CELL

*This picture of an actual cell in a Borstal institution shows at once that this is no normal prison*

be sent to a special Borstal institution

Borstal treatment for young offenders was first tried in 1902 and has grown to a remarkable extent. It is not intended for those guilty of trivial offences or for first offenders, but only for those who have criminal tendencies or habits which require special instruction and discipline to eradicate.

A reformatory process of this kind takes some time, and it is therefore laid down that the treatment should be for not less than two years and preferably for three. The Borstal authorities however have power in suitable cases to grant a release on licence at an earlier date. During the war, owing to shortage of space and for other reasons this proviso was freely used and offenders were released after six

months or a year, often with disastrous results. This shows that the two-year condition was a wise one, and that in a shorter period there is little hope of effecting a lasting reformation of character in any young person who has seriously gone off the rails.

It would be too much to hope that the treatment can succeed in every case, but even if the percentage of successes is as large as fifty per cent, which is a fair estimate, the experiment has been well worth while. It has been found, however, that this treatment is less effective with the older age groups, and the Criminal Justice Bill of 1948 proposes to reduce the age limit to twenty-one.

The system is a compromise between the conditions of a prison and a public school. There are no warders; the lads go about the buildings freely, they do not wear prison clothes, there is no rule of silence. Every effort is made not only to teach the rudiments of a trade, but above all to inculcate the elements of

good citizenship. The aim is to give young offenders whose characters are still in process of formation a new deal and, by personal influence and example on the part of the staff, to create a standard of social behaviour which will persist after release. Hence everything possible is done not merely to stimulate intelligence, and teach habits of industry and application but also to develop by sports and games the team spirit and sense of fair play. An increasing measure of trust and responsibility and freedom are accorded to each boy who shows himself worthy of it.

A Court of Summary Jurisdiction cannot itself send a young offender to Borstal, but can only commit him to Quarter Sessions for this purpose.

At present the number of Borstal institu-

tions is far from being sufficient. The original one, at Borstal, a little Kentish village near Rochester, was authorized by Parliament in 1908. Since then similar institutions have been started in other places, including one for girls at Avlesbury. Of course there is room for improvement in the system particularly in regard to overcrowding, better classification of delinquents, more suitable buildings, improved methods of teaching and so on. Nevertheless the results already obtained and the numbers of boys and girls who have derived moral and material benefits from the influence and training to which they have been subjected shows that we are on the right lines. At present the main difficulties are lack of money and insufficient staff.

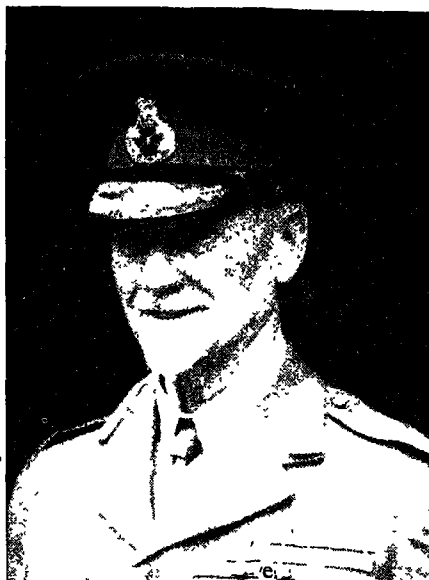
In this brief survey of the English magisterial system its functions, powers and responsibilities, every effort has been

made not to enter too much into technicalities but merely to give a concise account of a vitally important instrument in the administration of justice and the preservation of law and order. Many reforms have been foreshadowed and may be carried into effect in the post-war years. Proposals have already been made for regrouping certain courts, particularly in the Metropolitan area for the provision of new buildings in more convenient localities, for the better training of justices, clerks and for the removal of existing anomalies in jurisdiction and procedure. But even as matters stand there can be no doubt that the system of summary justice as administered today has amply proved its worth, and that, in spite of what some critics may say, magistrates, both professional and lay, discharge their manifold functions with a meticulous regard for the claims of justice, humanity and mercy.

### *Test Yourself*

- 1 What proportion of the offences which come before the courts are tried by magistrates?
- 2 How many kinds of magistrates are there, and which kind is the most numerous?
- 3 How did the modern police force begin?
- 4 What are the two main functions of a magistrates' court?
- 5 Where are appeals against a conviction by magistrates heard?
- 6 What proportion of cases in the magistrates' courts deal with motoring offences?
- 7 What are the limits of the magistrates' jurisdiction in matrimonial cases?
- 8 What is a Borstal institution?

*Answers will be found at the end of the book.*



#### SOME FAMOUS DOMINION STATESMEN

*Portraits of four well-known statesmen of the Dominions of the British Commonwealth of Nations are seen here. They are (above) Mr. Joseph Chifley (left) of Australia, and Field Marshal Jan Smuts (right) of South Africa, and (below) Mr. Peter Fraser (left) of New Zealand, and Mr. Mackenzie King (right) of Canada.*

## CHAPTER VIII

# LAW AND GOVERNMENT IN THE BRITISH DOMINIONS

WHAT is a Dominion? It is not easy to say. The answer is partly a matter of history. The Dominions are those communities within the British Empire which were at one time governed to a greater or less extent from London and are now completely self-governing. When they were controlled from Britain they were called colonies, now that they control themselves, they are called Dominions. Historically a Dominion could be defined as a grown-up colony. They are daughters but adult daughters, equal in status with their mother country in the family known as the British Commonwealth of Nations. And their names are the Dominion of Canada, the Commonwealth of Australia, the Union of South Africa and the Dominion of New Zealand. The Dominions of India and Pakistan (1947) and Ceylon (1948) complete the list, but they are not separately discussed in this chapter. Newfoundland was a Dominion until 1934, when it asked that its self-government should be suspended, and then it lost, consequently, its claim to be called a Dominion. Eire, formerly called the Irish Free State, has been called a Dominion, but it is probably more accurate to say that Eire was not a Dominion because she was not a grown-up colony, not a grown-up daughter of Great Britain, but herself a sister kingdom to Great Britain, a mother country to the Dominions just as Great Britain was.

### Family Resemblances

This talk of a family of British nations may seem inexact and unreal. Yet it expresses a great deal of the truth concerning the relations of these countries to one another and of their individual nature.

The Dominions, as grown-up daughters of one family, have certain family resemblances. They are all kingdoms and they

all recognize the same personage as their king. Each has a Governor-General who represents the King in the Dominion. Laws are passed by the King or his representative by and with the advice and consent of the two houses of the legislature in every case.

### Dominion Legislatures

Administration is effected in the name of the King or his representative, the courts are the King's courts. Each Dominion has a system of cabinet government formed upon the model of British cabinet government, with a Prime Minister and ministry chosen from and responsible to the legislature, holding office because they have the confidence of a majority in the lower house of the legislature, and continuing in office so long as they retain that confidence. The Governor-General occupies a position in relation to the conduct of public affairs in the Dominion similar to that which the King occupies in relation to the conduct of public affairs in Great Britain. Confronting each of His Majesty's Governments in the Dominions there stands the Leader of His Majesty's Opposition, ready, with his colleagues, to take over the administration of the affairs of the Dominion if he can succeed, by parliamentary action or as the result of a general election, in obtaining a majority in the legislature. The parliamentary procedure of the Dominion legislatures, moreover, is modelled largely upon the procedure of the House of Commons in Britain, British practice and British precedents are frequently quoted and normally followed. And finally, universal adult suffrage is established in practically all cases (although for people of white descent only in South Africa). Each Dominion is an example of the democratic form of government, operating through the machinery of parliament.





#### GOVERNOR-GENERAL IS SWORN IN

*Governors-General of the Dominions are the King's personal representatives. This picture shows the Duke of Gloucester being sworn in when beginning his term of office in Australia*

It is important to stress these family resemblances. But it is a characteristic of families that their members exhibit striking differences as well as striking resemblances, and that, especially when their younger members have recently grown up, they lay stress more upon their individuality than upon their family likenesses. The British Dominions, for all their family resemblances, are individuals with a strong sense of difference. And it is of their individuality that one must speak most.

Take a first example. One member of the British family, South Africa, though it has the British form of government, and though its people are British subjects, cannot be called British in the same way in which Australia, or New Zealand, can. In Australia and New Zealand almost the whole population is of British stock; in

South Africa only a minority of the population is of British stock. Out of the total population of the Union of about ten millions, there are about two million Europeans, and of these Europeans only about thirty-five per cent are of British stock. About sixty per cent are Afrikaners, mainly descendants of Dutch colonists, speaking their own language, nationally conscious, and following a distinct form of religion and way of life.

So, while Australia and New Zealand are relatively simple examples of the grown-up daughter nation, South Africa is more complicated. Here, if the analogy of the family may be pursued, the daughter has united herself in marriage with someone outside the family. To the Afrikaner, Britain is not a mother country, she is, if anything, a mother-in-law country. The

Union of South Africa forms a new union of peoples, a mixed marriage, and its relations with Britain and the other British nations must be of a very different kind from the relations of, say, Australia and New Zealand

One result of the fact that South Africa is not racially predominantly British is that it has stressed the idea of independence and individuality more than other Dominions. When, in 1931, the Parliament of the United Kingdom passed the Statute of Westminster, with the object of permitting Dominion parliaments to control completely the making of laws in their respective Dominions, Australia and New Zealand were reluctant to accept the full powers which the Statute offered, they were content with the equality in practice which they already enjoyed. But South Africa was eager to obtain the fullest emancipation in law which the British Parliament offered.

#### South Africa and Canada

As soon as the Statute was passed the South Africans considered how it might be given complete effect in the Union. They turned first to their constitution. The constitution had been drawn up in South Africa by South Africans in 1909 and it had then been enacted by the British Parliament. Its validity and superiority in the law of the Union arose, therefore, from its status as an Act of the British Parliament. This seemed to some South Africans a sign of subordination to Britain. Soon after the Statute of Westminster was passed, therefore, General Hertzog's government asked the Union Parliament to re-enact the constitution of the Union as an Act of the Union Parliament, thus giving to South Africa a constitution which could be considered as a purely South African product. This has not yet been done, but by the Status of the Union Act, 1934, the Act of the British Parliament is deemed to be an Act of the South African Parliament. At the same time the Union Parliament was asked to remove from the constitution a number of legal inequalities—for example, powers by which Acts and Bills of the Union Parliament might be rendered of no effect by the British Govern-

ment—which were still permitted to survive in the constitutions of Australia, New Zealand and Canada.

In 1934 the Union considered executive as well as legislative arrangements. Until that time it had been the practice for the executive authority of the Union to be exercised partly by the King—in particular in foreign affairs and in the declaration of war—and partly by the Governor-General. When the King exercised his functions he acted, legally, upon the advice of Ministers in the United Kingdom, and, although they had come in practice to act merely as the agents of South African Ministers, there was, in law, a restriction upon the authority of the South African Ministers. The Union Parliament passed in 1934 the Royal Executive Functions and Seals Act, a companion Act to the Status of the Union Act, and its purpose was to make it possible for all the executive functions of the Union to be exercised, whether by the King or the Governor-General, upon the advice of Union Ministers, and to make unnecessary even the formal intervention of Ministers of the United Kingdom.

The result of this legislation was that there was concentrated in the Union the machinery necessary for the conduct of all its affairs. In particular it was possible for the Governor-General on the advice of his Ministers in the Union, to declare a state of war or of neutrality on behalf of the Union, and to appoint plenipotentiaries to foreign courts and to ratify treaties. South Africa, too, through its own legislative and executive machinery, could carry out, by its own uncontrolled and autonomous institutions, the steps necessary to secede from the British Commonwealth, if it wished to do so.

All these arrangements were in full accord with South Africa's status as a Dominion and with the understandings which governed the relations of members of the British Commonwealth. But in South Africa alone were they worked out in legal terms almost to the extreme limit. In New Zealand and Australia the law has been much less changed in regard to the matters so far discussed in relation to South Africa. The difference in attitude



between the two types of Dominions is largely explained by the difference in racial composition.

A further illustration of the effect of this factor is found when we consider Canada. Here is a case which comes midway between South Africa and the Australasian Dominions. Canada is not, in racial composition, predominantly British as are Australia and New Zealand; but it is not, on the other hand, predominantly non-British. Its racial composition is practically in opposite proportions to that of South Africa. Where South Africa has sixty per cent Afrikaners and thirty-five per cent of British stock, Canada has fifty per cent of British stock, about thirty per cent French-Canadian, and the remaining twenty per cent of European or other stocks. Here is another example of a daughter nation which has married a foreigner, has contracted a mixed marriage—more mixed than in South Africa, for it is a marriage not between two Protestant peoples but between Protestant and Catholic. It is not surprising that the Canadian union led the way in asserting the independence of the Dominions from the United Kingdom.

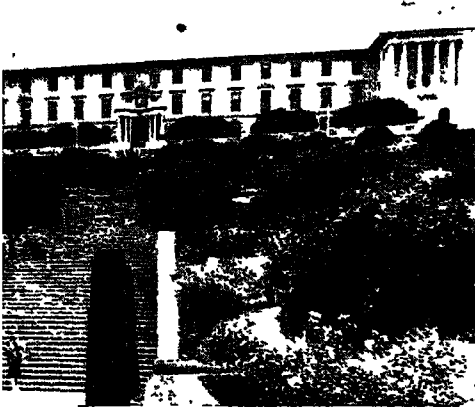
The Canadians have not pushed their independence so fast and so far in matters

of law as the South Africans have, but they, too, have constructed a system of independent executive institutions which gives them, in law, complete control over such matters as peace and war, neutrality, and the conduct of foreign relations. In 1939 Canada passed a Seals Act to make it unnecessary for the King to use a British seal, inevitably under the control of British Ministers, in taking executive action for Canada.

Up to 1939 there had been for Canada a division of legal authority between the King and the Governor-General similar to that in South Africa before 1934. The formal intervention of United Kingdom Ministers had been required. Thus, when in 1939 the King was to visit Canada in person, and it was desired that he should participate personally in some of the formal functions of government, a difficulty arose because, by law, he could perform these functions only through the use of British seals and these seals were not only under the control of his British Ministers, but they could not, of course, be taken away from Britain. It was necessary therefore, if the King was to take part personally in Canadian government that some other seals should be used, and the Seals Act of 1939 made this possible.

UNION BUILDINGS, PRETORIA

*Pretoria, centre of the gold and diamond mining country, is the administrative capital of the Union of South Africa*



But the Act did more than provide for a temporary purpose. It brought the King directly into contact with a purely Canadian system of legal machinery by which all executive functions of Canada were controlled by Canadian Ministers. When in September, 1939, Canada decided to declare war on Germany, the King's action was taken upon the direct advice of Canadian Ministers, and Canada's declaration took effect from September 10, the date of the King's approval of it, and not from September 3, the date of the British declaration. In this separate declaration of war Canada acted on similar lines to South Africa, although in the South African case the government chose to use the Governor-General and not the King as the instrument of their action, and their declaration dated from September 6.

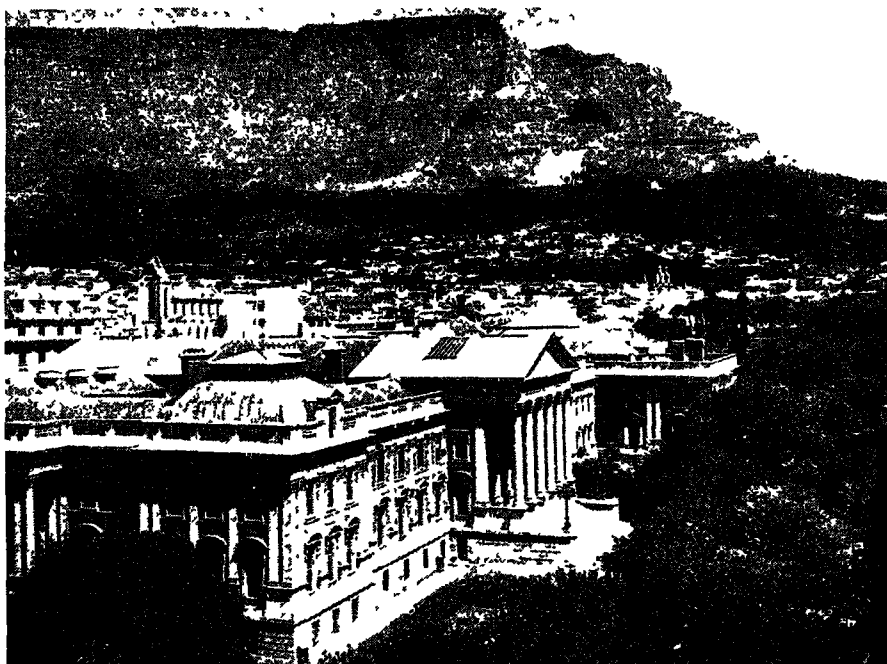
Yet Canada, with all its striking resemblances to South Africa in these matters of status and independence, shows also some striking differences. South Africa accepted the fullest legislative powers which the Statute of Westminster conferred, and used them to re-enact its constitution as a South African statute, alterable at will by the Parliament of the Union, which described itself as "the sovereign legislative power in and over the Union." Canada

did not accept the fullest powers available under the Statute of Westminster; it specifically asked that no power conferred by the Statute should apply to the repeal or amendment of the Canadian constitution—the British North America Act, 1867, and certain subsequent amending Acts. Whereas South Africa was anxious to change the nature and validity of its constitution from British to South African, Canada went out of its way to keep its constitution a British statute. What was the reason for this?

• Effect of Federalism

The reason has nothing to do with the fact that fifty per cent of the Canadians are of British stock whereas only thirty-five per cent of the South Africans are. But it has something to do with the fact that thirty per cent of the Canadians are *not* of British stock, that they are French-Canadians, living for the most part in the single province of Quebec. The Dominion of Canada is a federation, a system of government in which powers are divided between a general government for the whole country and provincial governments for parts of the country. The powers of the Dominion and provincial governments are set out in the constitution and these governments are subordinate to the constitution, which guarantees their position and powers. One reason why this federal system was adopted is that the French-Canadians in Quebec would not unite with the other British North American colonies unless they had a guarantee that some powers would be left to their own independent control. In a unitary state, Quebec would have been a French Catholic minority at the mercy of an English Protestant majority. In a federation, Quebec has independence within a specified sphere, at any rate.

In such a situation the authority of the constitution is most important. If it becomes subordinate to either the general



GOVERNMENT BUILDINGS, CAPETOWN

*Capetown forms the legislative capital of the Union of South Africa. The government buildings are here seen in the shadow of Table Mountain, which dominates the city.*

or the provincial governments then the federal system is destroyed. For Quebec in particular it is most important that the power to alter the constitution should not be in the hands of the Parliament of the Dominion. And, indeed, all the other eight Canadian provinces hold the same view, though perhaps less intensely.

The passing of the Statute of Westminster, with its proposal to confer powers upon the parliament of a Dominion to alter any Act of the British Parliament which was part of the law of a Dominion, seemed to constitute a threat to Quebec and to Canadian federalism. For did it not offer to the Dominion Parliament the power to alter the British North America Act, 1867, which was a British Act in force in the Dominion? It was decided, therefore, by the provinces and the Dominion in consultation, that, in order to preserve the supremacy of the constitution in Canada

and safeguard the federal division of powers, the British North America Acts, 1867 to 1931, should be excluded from the operation of the Statute. This means that the legal power of altering the constitution of Canada still rests with the Parliament of the United Kingdom. In practice that power is not exercised unless Canada requests that it shall be.

It is interesting that the mixed racial composition of Canada should lead to the preservation of its constitution as a British statute, and the mixed racial composition of South Africa should lead to the transformation of the constitution from a British into a South African statute. Both Dominions have a strong desire for independence. What made the difference was the federal system. Had South Africa adopted federalism when it united in 1910 it is possible that its action in 1931 would have been similar to Canada's—possible.

but not certain, for South African nationalism is stronger than Canadian.

This is speculation. What is certain is that the existence of a federal system in Canada and the desire to preserve it caused at any rate the postponement of the question. How can the constitution of Canada be at once federal and Canadian?

The discussion of Canadian federalism brings to light another kind of difference among the grown-up members of the British family of nations—the difference in their internal structure.

#### Differences in Dominion Government

Some are unitary—that is to say, the general legislature of the Dominion, like Parliament in the United Kingdom, is the supreme legislative authority within the Dominion. South Africa and New Zealand are examples of this type. It does not preclude a considerable measure of decentralization or devolution in government. The four South African provinces—the Cape, the Transvaal, the Orange Free State and Natal—have provincial councils with substantial legislative powers. Nor does it mean that the constitution of the Dominion is completely subordinate to the general legislature. In South Africa the Union Parliament has full power to amend the constitution, in New Zealand until 1947 the Dominion Parliament had not. But what is requisite in a unitary government is that, whatever restrictions the constitution does place upon the general legislature, it must permit it to override any other legislative bodies established within the territory.

In federal governments, on the other hand, the constitution marks out separate spheres of action for the regional and the general legislatures and the latter cannot override the former. We have seen that Canada is one example of this type. The Commonwealth of Australia is another.

It will be seen how curiously the division of the Dominions into unitary and federal governments cuts across their division by racial composition and their attitude to questions of status and independence. South Africa, which, on racial composition is grouped with Canada as a Dominion

which has adapted its machinery of government to make possible complete South African control over its affairs finds itself grouped, on a classification by structure with New Zealand as a unitary state—New Zealand, almost one hundred per cent of British stock, reluctant to accept any of the provisions of the Statute of Westminster and prepared in 1939 and thereafter to endorse the British declarations of war rather than to acquire the necessary legal powers and to establish the necessary legal machinery for separate and independent action. So, too, Australia with its homogeneous population, racially so different from Canada, finds itself grouped with Canada structurally as a federal government.

And here a puzzle arises. If Canada chose federalism because, among other reasons, of its racial diversity, why should Australia, with its racial homogeneity choose federalism also? And, what is more, choose a form of federal constitution which, at the time when it was drawn up at any rate, appeared to give far greater independence to the regional governments than the Canadian constitution did?

#### Powers of the States

Roughly speaking, the difference between the method by which powers are divided in the Australian and Canadian constitutions is that in the Australian certain powers are given to the Commonwealth Parliament either exclusively or concurrently with the states and the remainder, the residuary powers, as they are called, are left with the states whereas in the Canadian constitution certain powers are given to the provinces exclusively and the residue is given to the Dominion. Though everything depends of course upon the nature of the powers allotted in each case and the terms in which the grant is given, it is fair to say that the Australian system of division seems to give the benefit of the doubt, if there is any to the states and the Canadian to the Dominion. Other provisions of the Canadian constitution support this view. The Dominion Government has power to disallow an Act passed by

## HOUSE OF COMMONS, CANADA

*A scene in the Canadian House of Commons Chamber in the Dominion Houses of Parliament during the presentation of a budget.*

a provincial legislature; it appoints the Lieutenant-Governor of a province—the formal head of the provincial government—and can require him to refuse his assent to a provincial bill or to reserve it for the consideration of the Dominion Government, which may subsequently veto it. The Dominion Government appoints the judges of the principal provincial courts. All these provisions show that the framers of the Canadian constitution intended to bring the provinces to some extent under the control of the Dominion Government. Nothing of this kind is found in the Australian constitution. It follows very much the model of the constitution of the United States.

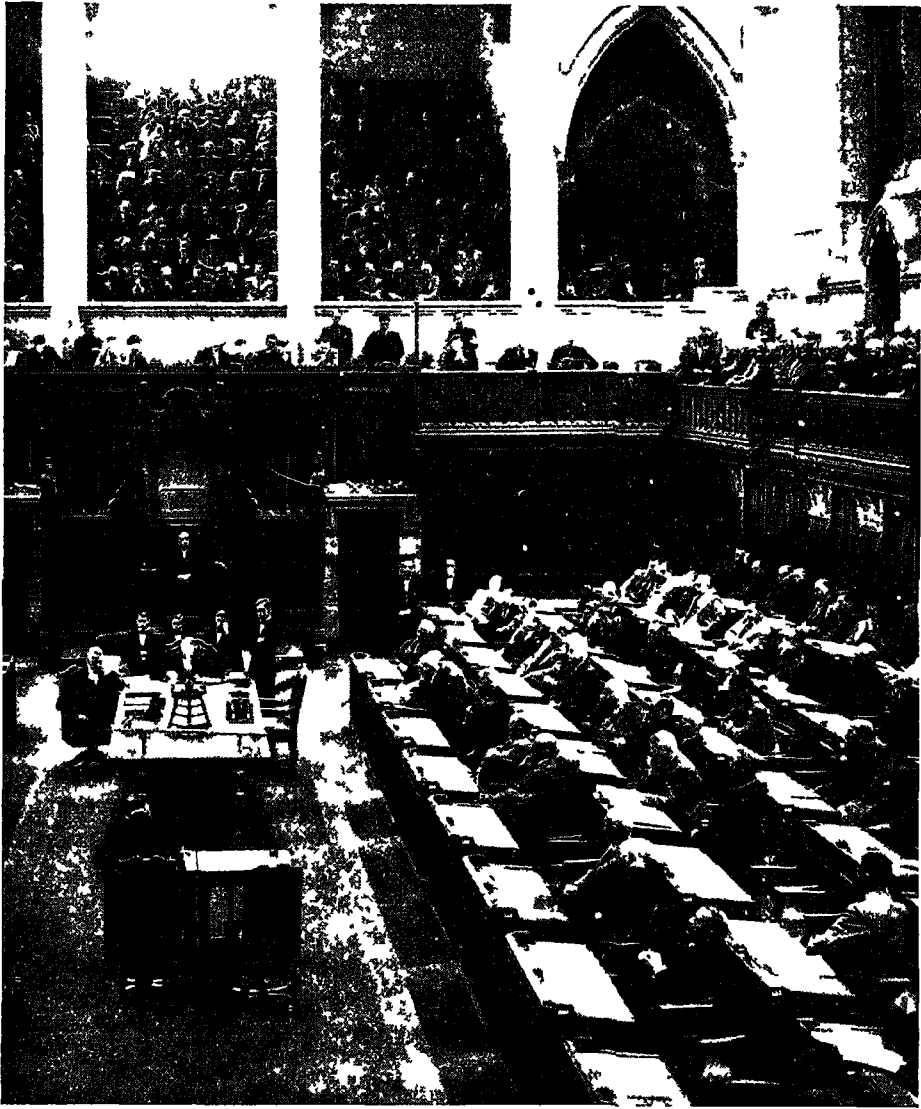
Why did the Australian constitution take this rather unexpected form? The mention of the United States suggests a part of the explanation. In 1866, when the Canadians were preparing their constitution, they had just observed the great crisis of the American constitution, where over-insistence upon state rights and independence had led to the break-up of a union and a terrible civil war. The influence of the United States operated in 1866 to encourage the founders of the Dominion of Canada to curb regional independence and to provide some machinery for integrating the Dominion.

But by 1900 the American Union had achieved a great place in the world; it was the most successful example of federal government and it was a great power. The United States was not considered in 1900 to provide a convincing argument against state independence if there were strong forces working in its favour. And there were strong forces in Australia. The six colonies had had a long history as separate governments; the main centre of population in each state was widely separated from that in other states; tariff barriers had assisted to produce a diversity of economic interests.

The result of such considerations was that



in spite of the unifying influences of common nationality and common language, the Australian colonies chose to construct a federal Commonwealth organized, as to its division of powers between central and regional governments, on the American model and not on the Canadian. Each state has its Governor appointed not by



the Governor-General but by the King, the Commonwealth Government has no control over state legislation by the use of such powers as disallowance and reservation, as in Canada. Each government is separate and independent in personnel from the other.

There, at any rate, was the original model

for Canada and Australia. Yet the curious thing is that, in the course of years, unification has made greater progress in Australia than in Canada, and it is probably true to say that today the control of the central government over the regional governments is stronger in Australia than in Canada. It is true that the Dominion Government





FIRST PARLIAMENT BUILDINGS IN QUEBEC

*Quebec was captured from the French in 1759 by Wolfe, and was taken over by the British as the seat of government in Canada. This old print shows the first parliament buildings still bearing marks of the fighting that took place in the city. Quebec is the capital of the province bearing the same name, it retains strong ties with its French founders and is largely Catholic in religion.*

in Canada has used its powers of disallowance and reservation to control provincial legislation, but the control has been intermittent and sparing. The practice, as opposed to the law, of the Canadian constitution has recognized the independence of the provincial governments.

A principal factor in promoting unification in Australia and in preventing it in Canada has been, however, the process of judicial interpretation of the constitution. All the Dominions have their systems of courts, culminating in each case in a supreme court of appeal—the Supreme Court of Canada, the High Court of Australia, the Appellate Division of the Supreme Court of South Africa, and the Supreme Court of New Zealand. But from all these courts there exists an opportunity of appeal—restricted to a greater or less degree in each case—to the Judicial Committee of the Privy Council, sitting in London.

We find that in Canada appeals are not

permitted in criminal cases, and a bill to abolish appeals in civil cases has been passed but is at present suspended. In Australia appeals upon cases involving the constitutional powers *inter se* of a state and the Commonwealth, or of a state and other states, cannot come to the Judicial Committee except by leave of the High Court of Australia. Appeals are permitted from South Africa only if special leave is obtained from the Judicial Committee. Appeals from New Zealand are relatively unrestricted. It may be added that it is within the power of the parliaments of Canada, Australia and South Africa to restrict or abolish appeals to the Judicial Committee if they choose, and that New Zealand acquired such a power by adopting the provisions of the Statute of Westminster in 1947. But, apart from the limitations already mentioned, the Dominions have been content to leave the appeal as it is, though it might be thought to constitute, in law, a restric-

tion upon their sovereignty. Even in South Africa the government has resisted attempts to restrict or abolish the appeal, arguing that, as the British minority has some attachment to the appeal, it is better for the Afrikaans majority not to disturb it. In practice, appeals from South Africa are very rarely entertained.

The principal significance of the appeal to the Judicial Committee arises in the consideration of the two federal Dominions, Canada and Australia. The position has been that the last word upon the meaning of the Canadian constitution and, in particular, upon the powers and status of the provinces as against the Dominion, has rested not with the Supreme Court of Canada but with the Judicial Committee, a body usually composed of British judges. In the case of Australia, through the restriction of appeals by the provision, already mentioned, that the leave of the High Court must be obtained in what have come to be called *inter se* disputes, the last word has rested, for the most part, with the High Court of Australia. On a view of the whole trend of judicial interpretation in Canada and Australia, it is

clear that the Judicial Committee has, by its judgments, strengthened the position of the Canadian provinces, while the High Court of Australia has magnified the powers of the Commonwealth as against the states.

We do not have to conclude, of course, that either body has pursued principles of interpretation which would conflict with those of the other. Each has interpreted a different constitution from which different conclusions can be drawn. None the less there have been occasions when the Judicial Committee has taken a different view from the High Court of Australia and it is likely that, if the last word upon the Australian constitution had rested with the Judicial Committee, the powers of the states might be greater now than they are.

An important example of this difference in the interpretation of the Canadian and Australian constitutions is found in the decisions of the Judicial Committee and the High Court respectively upon the extent of the power possessed by the parliament of each Dominion to give effect to treaties contracted by the executive of the Dominion. The wording of the constitution differed in each case and the



FIRST PARLIAMENT BUILDINGS IN ONTARIO

*Little more than huts, these wooden buildings housed the first parliament of Ontario and were used from 1796 until 1813. They have long disappeared, and the great city of Toronto now stands on the site. The illustration is from a photograph of an old drawing.*

difference was important. The Dominion Parliament of Canada was given power (in S 132 of the British North America Act, 1867) to perform "the obligations of Canada or any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries." The Commonwealth Parliament of Australia was empowered (in S 51 (xxix) of the constitution) to make laws with respect to external affairs.

#### **Dominions and Foreign Treaties**

In 1935 the Judicial Committee decided that the Canadian Parliament had full power to give effect to treaties made between the British Empire and foreign countries but that its power to do so with treaties made between Canada and foreign countries—and since 1919 almost all treaties in which Canada was concerned were made in this way—was limited to provisions which dealt with subjects upon which the Canadian Parliament was permitted by the constitution to make laws. Other provisions in Canadian treaties must be carried out, if at all, by the provincial legislatures. This has put Canada internationally, into an unfortunate position, for although the Dominion Government can make treaties on any matter whatsoever, it may find itself constitutionally unable to give them effect, unless the legislatures of all the nine provinces are willing to lend their aid.

In Australia, on the other hand the High Court decided in 1936 that the Commonwealth Parliament was empowered to implement any treaty validly made by the Commonwealth executive. Now it should be stressed that the power conferred on the Australian Parliament by its constitution was expressed in unqualified terms and it could be maintained that if the same terms had been used in the Canadian constitution the Judicial Committee would have come to the same conclusion, in respect of Canada, as the High Court did for Australia. None the less it was strongly argued in Canada that, on the words as they stood the Judicial Committee would have been justified in deciding that the

Canadian Parliament had full powers to implement treaties. The Supreme Court of Canada, at any rate took that view, but it was reversed by the Judicial Committee.

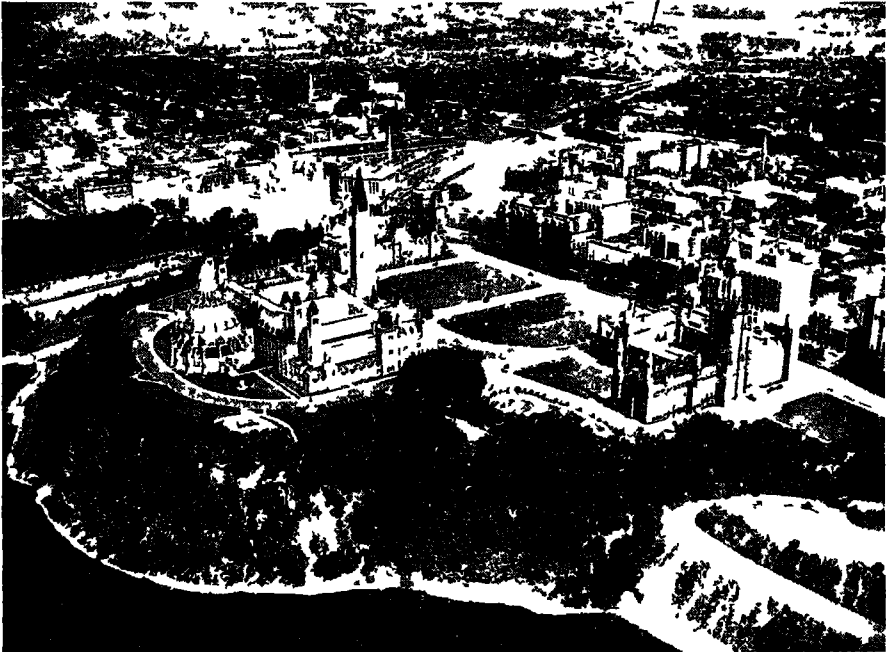
A word must be said of the process of constitutional amendment in the Dominions, a matter of particular importance where federal systems are concerned. It is a consequence of the independence of the Dominions that the power to amend their constitutions should be confided to them and should not depend upon the consent of the British Parliament. That is accepted in practice, though in law not all the Dominions have chosen to adopt it.

#### **Dominions and Constitutional Changes**

In South Africa there existed before the passing of the Statute of Westminster 1931, some restrictions upon the power of the Union Parliament to amend its constitution. With the passing of the Statute those restrictions have been either abolished or rendered nugatory, and the Parliament of the Union has now full power to amend the constitution. In New Zealand there were some restrictions upon the power of the Parliament to amend the constitution, but in 1947 they were removed by the United Kingdom Parliament at once at New Zealand's request.

The position of Canada has been discussed already. For federal reasons the power to amend the constitution remains with the British Parliament.

We find that in Australia a power to amend the constitution of the Commonwealth was conceded in the original constitution of 1900, and it is operated independently of any control by the United Kingdom. Amendments are passed through the two Houses of the Commonwealth Parliament and are then submitted to a referendum of the people, and they come into effect if approved by a majority of all the electors voting and by a majority of electors in a majority of states (at present this means in at least four out of the six). This process of amendment clearly was intended to safeguard the rights of the states. When the Statute of Westminster came to be passed, the Australian



AERIAL VIEW OF OTTAWA

*Federal capital of Canada, Ottawa is here seen from the air. The Dominion Houses of Parliament are seen to the left, Château Laurier, named after the great Canadian Liberal Prime Minister, Sir Wilfrid Laurier, can be seen on the right.*

states, like the Canadian provinces, were opposed to any provision which might make the constitution of the Commonwealth—an Act of the British Parliament—subject to amendment by the Commonwealth Parliament alone. They desired, therefore, the insertion of a safeguard, similar to the Canadian, providing that nothing in the Statute should affect the existing process by which the Australian constitution is amended. The original process is, therefore, retained.

It is interesting to notice that whereas no power of constitutional amendment was granted to the Canadian colonies when they federated in 1867, such a power was granted to the Australian colonies in 1900. The explanation lies partly in the difference of date—the growth of self-government and the acceptance of its principles which went on from 1867 to 1900. But it may be also

that the fears of Quebec in the Canadian Union made it necessary to retain the power of amendment in British hands, for it is doubtful if Quebec would ever have consented—or would consent even now—to a method of constitutional amendment whereby a majority of Canadian provinces, no matter how large, could carry an amendment against the wishes of Quebec. That, after all, is what the Australian process of amendment, and indeed any process of amendment that falls short of requiring unanimity, makes possible.

Yet in spite of the difference between Canada and Australia in the matter of a legal power to amend the constitution, both show great similarity in their use of what powers they have. There has been only one amendment of the Canadian constitution which alters the division of powers between Dominion and provinces—the

amendment of 1940, which granted the control of unemployment insurance to the Dominion. For the rest, although there have been about a dozen amendments all told, none has been fundamental and no successful attempt has been made to overhaul the whole constitution by amendment. In Australia such attempts have been made but with little success. One amendment only, that of 1928, by which the financial relations of the Commonwealth and the states were reformed, has been of any outstanding importance. The remaining few that have been carried are of minor importance. Several attempts have been made to obtain a big revision of the division of powers—the last and most comprehensive being in 1944—but they have been rejected by the electorate, in almost all cases both by a majority of all the electors voting and by a majority of electors in a majority of states. The process of amending the constitution in Australia has proved as rigid in practice as it has in Canada.

#### Two-Chamber Legislatures

All four Dominions have a bicameral legislature (i.e. one having two houses). The lower house—called the House of Commons in Canada, the House of Assembly in South Africa, and the House of Representatives in Australia and New Zealand—is elected by universal adult suffrage<sup>1</sup> in all cases. The upper house, in three of the Dominions, is designed to represent the regions which have united to form the Dominion. This is not unexpected in the case of the two federal dominions, for it is usually considered advisable in a federation to compromise by providing for representation according to population in the lower house and representation according to regions in the upper.

The Australian Senate follows the model of the American Senate in giving equality of representation to the states irrespective of population. Each of the six states is represented by six senators elected by the

people of the state and holding office for six years, half retiring every three years.

In Canada equality is not conceded. Out of a total of ninety-six senators, all of whom are nominated by the Dominion Government and hold office for life, Quebec and Ontario, with twenty-four each, hold half the membership. The maritime provinces have a quarter of the membership—Nova Scotia ten, New Brunswick ten, and Prince Edward Island four—and the western provinces the remaining quarter—Manitoba, Alberta, Saskatchewan and British Columbia six each.

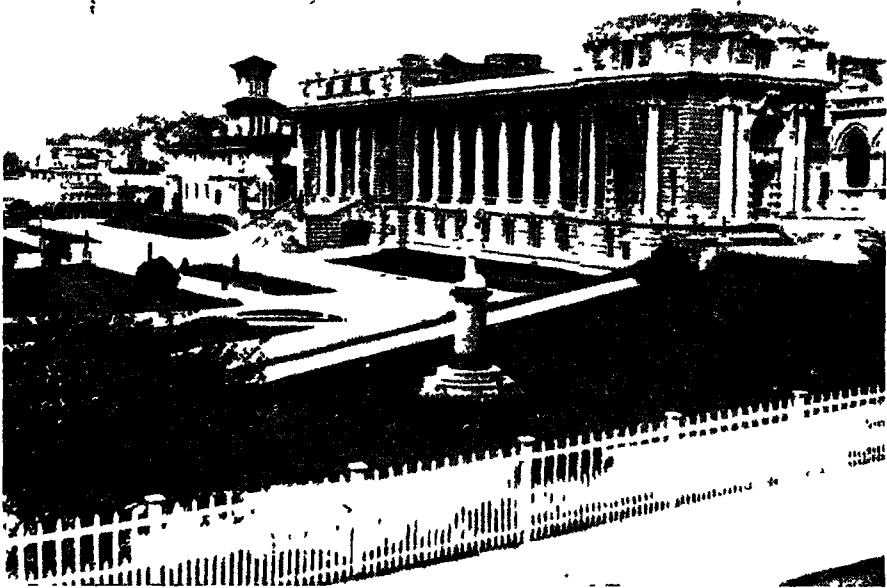
#### South African Safeguards

In South Africa it was considered wise when federalism was not adopted, to give some concessions to the uniting provinces which might safeguard their identity in some measure. One such concession was the provision that the Senate should be composed, for the most part, of representatives of the provinces chosen in equal numbers. There are eight senators from each province, they are elected by the members of the House of Assembly from a province sitting together with the members of the provincial council, in a joint meeting presided over by the administrator of the province, and they hold office for ten years, unless the Senate is dissolved earlier.

To these senators representing provinces are added eight by nomination of the Union Government, four being chosen mainly for their knowledge of the wants and wishes of the non-Europeans. In addition, since 1936 there has been provision for the election of four senators—all of whom must be Europeans—by the Bantu peoples of the four provinces voting through their chiefs, councils, boards and so on, and since 1946 for two Europeans to sit as senators to represent the Indian population of the Union, one to be elected by the Indians and the other to be nominated by the government.

The upper house in New Zealand follows quite a different pattern. It is called a Legislative Council, not a Senate, and its members are nominated by the Government, hold office for seven years, and are eligible for reappointment. There is no

<sup>1</sup>With the exception already mentioned that in South Africa Europeans only are admitted to this franchise Bantu coloured folk and Indians in Cape Province may be admitted to a restricted franchise and may elect three Europeans to represent them in the House of Assembly.



HOUSES OF PARLIAMENT, WELLINGTON

*Founded in 1840 by the first colonists to settle in New Zealand, Wellington is a flourishing city and seaport. It has been the capital since 1865—a position formerly occupied by Auckland. Above are the Houses of Parliament, which were completed in the nineteen thirties.*

legal provision to regulate the size of the Council; it usually numbers about forty.

In all four cases the upper houses are subordinate in power and authority to the lower houses. In some cases this is ensured by law. In South Africa and Australia the Senate is forbidden by law to amend money bills, but it may reject them. In Canada and New Zealand no such legal restriction is found, but constitutional convention tends to support the rights of the lower house to the control of the raising and spending of money. So also in South Africa and Australia there are provisions in the constitution for the solving of deadlocks between the Senate and the lower house, including the use of joint sessions in certain circumstances, while in Canada and New Zealand no special procedure is laid down, beyond the power—restricted to some extent in Canada—to add to the

numbers of the upper house by further appointments by the government of the day. This power has never been exercised in Canada or New Zealand.

The subordination of the upper houses is largely the result of convention, not law. The lower house is the house to which the Cabinet is, by custom, responsible. It is the house in which the Prime Minister and the principal Ministers are to be found and to which any politician desiring advancement will seek election.

In the federal Dominions the Senate have seldom proved valuable in defending regional interests. Perhaps this is not surprising in Canada, where nomination by the government of the day gives little assurance that senators will represent their provinces with any authority. It is the more surprising in Australia, where direct election by the people of the states might

be expected to produce a strong delegation pledged to support the interests of the states

The principal reasons for the relative failure of the Senate in Australia to support state rights are not easy to discover. But it seems likely that the fundamental reason is the factor of party. Senators put party considerations first, and a vote in the Senate, like a vote in the House of Representatives, is a vote for or against the Government. While senators may advocate the interests of their states, they are generally inclined in the end to vote for or against the Government in accordance with their party ties. In this respect the American Senate is in a different position. American senators are party men also, but their votes are not votes which will preserve or overturn the Government, for the American executive holds office for a fixed term of four years irrespective of whether it has the confidence of the Senate or of the House of Representatives. In Australia it is largely the factor of party, working through the cabinet system of government, the system of the parliamentary executive, which makes the Senate ineffective as an instrument to safeguard the rights of the states.

#### Party Politics

These two considerations of party government and cabinet government deserve consideration, for they are factors of fundamental importance in determining the character of government in the Dominions. Party is at the basis of the whole scheme in all the Dominions and it is infused through every branch of it. Elections are conducted on party lines, Prime Ministers are party leaders, cabinets are teams of party leaders who can, collectively, hold a majority in the lower house of the legislature.

The parties are nation wide and, in the federal Dominions particularly, they are a factor for national unity. They divide, in each Dominion, upon distinctive lines. In Australia and New Zealand economic issues have determined party divisions predominantly. In Australia there is a Labour Party representing primarily the

industrial working classes of the urban areas, a Country Party representing agricultural and primary producer interests, and a Conservative Party, under various names—first Liberal, then Nationalist, then United Australia, now Liberal again—which attempts to slow down the trend towards the Labour Party objectives.

In New Zealand the two principal parties are the Labour Party and the National Party, the former representing roughly the trade unions and the latter the farmers' union and the employers' and manufacturers' federations.

In Canada, though politics have been mainly concerned with economic questions since the foundation of the Dominion, it was for long difficult to see any clear division of economic interest between the two main Canadian parties—Conservatives and Liberals. In this Canada resembled the United States. The most that could be said, perhaps, was that the Liberals in Canada, like the Democrats in the United States, favoured a lower tariff than the Conservatives who, like the Republicans, were thought to favour the big manufacturing interests. Yet a study of the record of both parties in office shows little to support this view. But a new factor has come into Canadian politics with the emergence of a socialist or labour party—the Co-operative Commonwealth Federation (C C F), which secured office in 1944 in Saskatchewan and obtained twenty-eight seats in the Canadian House of Commons at the general election of 1945, thus doubling its membership. It may be that in Canada a new alignment of parties is to be expected, divided upon the economic issues known vaguely as capital<sup>1</sup> versus labour.

In South Africa, though economic questions occupy much political energy, the major party divisions have not coincided with the divisions of economic interest. Since the foundation of the Union the fundamental dividing issues between the parties have been questions of nationalism, and native affairs. It has been a struggle between those who favoured South Africa's

<sup>1</sup>There is a Social Credit Party in Alberta which won thirteen seats (all in Alberta) in the Dominion House of Commons at the general election of 1945.

membership of the British Commonwealth and her co-operation with other nations in it, and those who desired either to secede from the Commonwealth or, if not to secede, to restrict the amount of co-operation which the Union should give. What is clear is that there is no future, or no near future at any rate, for a Labour Party, for the labouring classes of South Africa are the native and coloured peoples and they are almost entirely excluded from participation in the elections for the Parliament of the Union. None the less a small Labour Party exists and holds a few seats in the Assembly. It has joined in coalition governments, such as that of Field Marshal Smuts from 1939 to 1945. But the major parties are the United Party, under the leadership of Field Marshal Smuts, and the Nationalist Party, under Dr. Malan<sup>1</sup> (which gained in favour in the elections

after the 1939-45 war), advocating republicanism and independence.

In most of the Dominions party discipline has to take account of the divergent interests of different parts of the country. In South Africa and the two federations parties are organized regionally as well as nationally, and the particular interests of different regions assert themselves. The most notable example of this is the position of Quebec in relation to the Liberal Party of Canada. The Liberals have a strong hold on Quebec, but they have it only on condition that they pay great attention to the views of Quebec. In 1944 and 1945 the Liberal Party nearly lost control of Quebec because it was obliged to adopt a measure of conscription for overseas service which was strongly opposed in Quebec. In the general election of July, 1945, Quebec did not reject the Liberals, though it returned some members whose support of the Liberal Party will be difficult to count upon at all times.

<sup>1</sup>At the other extreme is the Dominion Party, small in number but strong in support of South Africa's full co-operation in the British Commonwealth. It also joined in the coalition under Smuts in the war years.



#### EARLY JUSTICE IN CANADA

*Every Dominion has records of its pioneering days, but not all are as amusing as this sketch of a Canadian backwoods jury which has retired to an orchard to consider its verdict.*



In Canada and Australia regional considerations show themselves in an interesting way in the composition of the cabinet. In Canada it is a convention of the constitution that, whatever party is in power some place in the Cabinet must be found for a representative of each province, except Prince Edward Island which is too small to substantiate a claim, and that there should be French, English Catholics and English Protestants in certain proportions. It has usually been held that Quebec is entitled to four posts in a cabinet, three French and one English, that Ontario consequently should have at least four, that there should be one non-French Catholic preferably Irish and from Ontario, and that there should be one representative of the French outside Quebec. In Australia similar conventions obtain, though they are not so much complicated by racial and linguistic differences. But there is a rivalry between New South Wales and Victoria for the larger number of posts, and it is considered necessary to see that all the states are represented in the ministry.

It is clear that this federalization or regionalization inside a party and a cabinet makes for a certain weakness and indecision, and renders it likely that the best possible team from the party may not be chosen for the cabinet. But it is essential, in view of the fundamental forces operating in the two federal Dominions, to operate in this way. No other system would command a majority for long in the legislature.

#### Similarities and Differences

These are the principal institutions through which the citizens of the Dominions regulate their affairs. It has been remarked already that in South Africa only a minority of the inhabitants are entitled to take part in the government of the Union. The interests of the native peoples are intended to be represented in a Native Representative Council established in 1936 as an advisory body. In all the other Dominions the great bulk of the inhabitants have the vote including New Zealand, where the native Maori people, who form about five per cent of the population, take part on equal terms with the European population in the

government. Four seats are reserved for them in the House of Representatives, and there have been Maori ministers in the Cabinet.

The peoples of all the Dominions are British subjects. In addition to this two Dominions, Canada and South Africa, have created a distinct nationality of their own so that a Canadian or South African may have the double status of a Canadian or South African national and a British subject. Australia and New Zealand have been content so far with the single status of a British subject.

But apart from distinctions of nationality and allegiance as between one Dominion and another it is to be stressed that the rights and duties of citizens in one Dominion vary considerably from those of citizens of another Dominion. Though certain common institutions are found in all the Dominions, such as trial by jury and the writ of *habeas corpus*, the conditions attaching to them may differ to a greater or less degree. And in some matters like marriage and divorce, or freedom of speech and writing, laws differ not only from Dominion to Dominion but also, in the federal Dominions, from one part of a Dominion to another. The laws of Quebec are not the same as the laws of Alberta, and both will differ from the laws of New Zealand or New South Wales. So, while all the citizens of the Dominions may be British subjects and owe allegiance to one King the meaning which must be attached to their status and its duties can be determined only in the light of the laws of a particular Dominion. And those laws may well not be British in their origin. While Australia and New Zealand have a basis of English common law and British statute law, South Africa has adopted the system of Roman-Dutch law, in Quebec the civil law is based upon the ancient French customary law of Paris, while in the other provinces of Canada the English system prevails. And it is with this stress upon the diversity within the unity of the family of nations, a diversity which must never be overlooked or underestimated if the British Commonwealth is to be rightly understood that we turn to look, in con-

clusion, at the machinery through which these diverse and distinct individuals co-operate with each other in matters of common family concern

Each Dominion is represented in the United Kingdom and, in some cases, in other Dominions, by a High Commissioner and the United Kingdom itself is similarly represented in each Dominion. The Prime Ministers of the Dominions are entitled to communicate direct with the Prime Minister of the United Kingdom on matters of importance. A great deal of communication is conducted through the office of the Secretary of State for Commonwealth Relations. It is a constitutional convention of the Commonwealth that each member should communicate with another upon any matter in which the interests of the other might be affected and, in particular, that negotiations with foreign powers by any member should be conducted in communication and consultation with any others interested. All this is founded upon no legal requirements, it is embodied in a series of agreements drawn up between the Dominions and the United Kingdom from time to time. These agreements or constitutional conventions have been established principally at meetings of what is

the most important institution of Commonwealth co-operation, the Imperial Conference—a meeting of the Prime Ministers of all members of the Commonwealth held periodically to discuss matters of common concern. The Imperial Conference has a history dating from the Colonial Conference which met at the time of Queen Victoria's Jubilee in 1887, it was placed upon its present basis in 1907 and was known thereafter as the Imperial Conference. It has met since at irregular intervals—1911, 1917 and 1918 (the Imperial War Conference), 1921, 1923 (an Imperial Conference and an Imperial Economic Conference), 1926, 1930, 1932 (at Ottawa, an Imperial Economic Conference), 1937 and 1944.

The essence of the Imperial Conference is that it is a body for communication and consultation. Its members are committed to co-operate no further than that. The interesting and significant thing is that with so little obligation to co-operate the Dominions and the United Kingdom have succeeded on this basis of free will and equality in working together to the very limit in many spheres of action, and supremely so in the war of 1939 to 1945.

### Test Yourself

- 1 What is a Dominion?
- 2 State the importance of the Statute of Westminster of 1931
- 3 Why has South Africa stressed the idea of individuality more than any other Dominion?
- 4 Which Dominions have unitary governments and which federal?
- 5 Why is the Canadian Constitution still contained in a British Statute which only the British Parliament can amend?
- 6 State one important difference between the forms of federation of Canada and Australia
- 7 What is the supreme court of appeal from the courts of the Dominions?
- 8 What racial problem has South Africa from which the other Dominions are free?
- 9 What form of democracy has been adopted by all the Dominions?
- 10 What is the constitution and what are the functions of the Imperial Conference?

*Answers will be found at the end of the book*



#### AFRICAN CHIEFS AT A CONFERENCE

*Chiefs of the Western Provinces of Nigeria are seen at a Government conference at Ibadan. Matters concerning the efficiency and welfare of the chiefs' peoples were discussed.*

## LAW AND GOVERNMENT IN THE BRITISH DEPENDENCIES

THESE are about sixty territories which can be described as British dependencies, and their total population is about sixty millions. They are scattered throughout the world. They vary in size from Nigeria, with its twenty million people, to Mauritius with less than half a million, the Falkland Islands with about two thousand five hundred, and Pitcairn Island with about fifty. Each has its own system of government, varying to a greater or less degree from the others but all possess the common characteristic that they are dependent, in some measure, upon the United Kingdom. The form and extent of this dependence varies and there is therefore considerable difference of status between dependencies.

Some dependencies are called protected states and some protectorates. In neither case is the territory of the dependency regarded legally as British territory and its people are not British subjects, they are known as British protected persons. Tonga, a little island in the Western Pacific, ruled by Queen Salote, is a protected state, Nyasaland, Bechuanaland and Swaziland, in Africa, are protectorates.

### Similarities and Differences

The precise distinction between a protected state and a protectorate is a matter of some doubt and dispute. It has been said that in a protected state the Crown leaves sovereignty with the ruler of the state, whereas in a protectorate it takes over the sovereignty and the full rights of government are exercisable by it. But as in fact the Crown's control over some protectorates is very slight the administration being left to local rulers, subject to advice, there is often little difference in practice in the status of protected states and protectorates as dependencies. Nor is the distinction between these two types of dependency

and a third, the colony or crown colony always substantial. A crown colony is British territory, its people are British subjects. Examples of the crown colony may be found all over the world. In the West Indies are the colonies of Jamaica, Bermuda, Barbados, Bahamas, the Windward and the Leeward Islands, Trinidad, and, on the Central American mainland, British Honduras, and on the South American mainland, British Guiana. In the South Atlantic are the Falkland Islands, in the mid-Atlantic, St. Helena and Ascension, in the Mediterranean, Gibraltar, Malta and Cyprus, in the Indian Ocean, Mauritius and the Seychelles, in the Pacific, Fiji.

### Protectorates and Colonies

When we look at the British dependencies in Africa we see how the distinction between protectorates and colonies fades away. Here it is quite common to find a protectorate and a colony joined together for purposes of government, having the same governor and sometimes the same legislature. In West Africa this is the usual thing. There is the colony and protectorate of Sierra Leone, of the Gambia, of the Gold Coast and of Nigeria, the colony being in each case upon the coast, and the protectorate lying in the interior. In East Africa the position is reversed. Kenya is the colony and protectorate of Kenya, but there the protectorate is a coastal strip, the colony lies inland.

The territories so far mentioned—protected states, protectorates and crown colonies—are all in some degree British dependencies. But there is a class of territory which may be called a British dependency but it is not dependent on Britain alone. This is the condominium, the type of territory which is controlled by two or more Powers. Britain shares in the control of three such territories. There

## DAY IN THE LIFE OF AN AFRICAN RULER



*These pictures show something of the life and work of a chief of the Gold Coast Colony which is divided up into different administrative districts. The Volta River district, in the Eastern Province, consists of five states of which Many Krobo is one. The Koro, or Paramount chief, who is seen here, is the son of a famous African, Sir Emmanuel Matekole.*

*Although Many Krobo is not a large state it is highly thought of for its advanced and enlightened administration, inaugurated by Matekole. Above, the Koro begins the day by dictation to his secretary on matters of government. Right—a more informal moment—he sees his son and heir being bathed. Below, the Koro holds a conference with his sub-chiefs on the verandah of his residence.*



OLH. UNIV. LIBRY. SYSTEM



*The Kroboes are composed of six tribes, each with its own ruler. They are an agricultural people, having bought land from neighbouring tribes, and their wise farming administration has led to great prosperity. Their chief products are cocoa and palm kernels.*



*In Manya Krobo education and health are important factors in administering to the happiness of its 85,000 citizens. The Kono believes in personal supervision of departments in his state. On the left, he is talking to the English school teacher. Below, he pays a visit to one of the clinics and sees two mothers getting a word of advice from the nurse.*



*The communal well, below, receives the Kono's frequent inspection, for in Africa the struggle between man and the harsh forces of his environment is constant and evident, and a modern well is a battle won.*

**DLH. UNIV. LIBRY. SYSTEM**



is the island group in the Pacific known as the New Hebrides, controlled jointly by France and Britain, there is the Sudan, controlled jointly by Egypt and Britain and known as the Anglo-Egyptian Sudan, and there are the two small islands in the Pacific near the Equator, Canton and Enderbury, which, since 1940, have been controlled jointly by the United States and Britain.

The British dependencies are clearly of great variety, and no formal classification is exclusive and definitive even in theory, much less in practice. It is interesting to ask why there is such variety. The answer leads us almost certainly into inquiring how Britain came to acquire these dependencies. Sometimes it was by settlement—British subjects went out and made their homes in the territories which were, as a rule, annexed as colonies either already or later. Most of these colonies by settlement have now become Dominions.

But there remain examples like the Falkland Islands and St. Helena. Moreover, in West Africa a motive for settlement was trade, and in many cases the British Government followed its trading subjects and annexed territory for a colony. But it was reluctant to annex more than a minimum. Thus arose the colonies on the Gold Coast, Sierra Leone and the Gambia, for example. When trade extended itself, the British Government was obliged to extend its authority, not merely to protect the traders, but to protect the native peoples with whom traders came into contact. This extension of authority took the form, as a rule, however, not of further annexation, but of the establishment of a protectorate. That is why we have in West Africa this combination today of the small colony on the coast and the extensive protectorate inland.

The existence of these protectorates in West Africa, and of other African protec-



HE IS TEACHING HIS FATHER TO READ

*Picture vocabularies are used to teach the illiterate to read, and the young, who have learned, sometimes pass on their acquisition to their parents. These two are natives of Rhodesia.*

torates like Nyasaland, Northern Rhodesia and Uganda, is a standing reminder of the reluctance of Britain to annex territory. She was not reluctant to trade, and there is no need to apologize for that. Nor indeed was she reluctant to take on the responsibilities which trading was found to bring. But the annexation of territory was something which Britain most reluctantly undertook. It is well to stress this fact when it is so often assumed that Britain was a chief partner in a grab for Africa. The motives for the expansion of British control in Africa and in the Pacific in the last half of the nineteenth century and the beginning of the twentieth were mixed motives, and that means that if we are to mention motives like trade and strategy we must mention also protection and welfare and humanitarianism.

#### Record of Colonial Administration

How have these varied territories been administered? Here again there is a varied record. Until recently Britain has adopted a policy of *laissez-faire* towards its dependencies. Negatively that means that there has been no wholesale exploitation. That is an enormous gain. But it has meant that there has also been neglect. Colonies have been expected to be self-supporting, once they had got started. They were considered to be entitled to those services for which they could afford to pay. But this meant that, in many cases, too low a standard of life was permitted to continue. There might be little exploitation, but there was also little development. In 1929 there was passed the Colonial Development Act, which empowered the British Treasury to make advances, either as grants or loans, to the governments of dependencies for capital expenditure which might benefit British trade and industry. This was rather a limited measure of assistance limited to development, while the criterion applied was not the welfare of the dependency but the benefit to be derived by British trade and industry.

But it can fairly be said that a new policy was begun in 1940 with the passing of the Colonial Development and Welfare Act. It empowered the Secretary of State

for the Colonies to make schemes for the grant of money to promote both the development of the resources of a dependency and the welfare of its people. The grants were not confined to capital grants, they could be made to maintain a service as well as to establish it. And they were not to be made upon the sole consideration of whether they benefited the trade and industry of the United Kingdom, the benefit of the dependency was to be the primary consideration. Moreover, the Secretary of State was required to satisfy himself that the law of a dependency to which a grant might be made provided reasonable facilities for the establishment and activity of trade unions, and that fair labour conditions would be observed.

The sum provided in the Act of 1929 was £1,000,000 a year. The Act of 1940 provided £5,000,000 as a maximum per annum. It was followed in 1945 by a new Act which increased the sum to £120,000,000 for a period of ten years, subject to a maximum in any one year of £17,500,000. The policy was taken a step further with the establishment of a Colonial Resources Development Corporation with an extensive capital endowment. Plans are drawn up in the dependencies in the first instance and are discussed with the Colonial Office before they are finally approved. Circulars are sent out from time to time to guide local governments in the preparation of their plans. But the principle upon which the system is intended to work is laid down in the following passage from the speech of the Secretary of State when introducing the Bill in 1940:

'From London there will be assistance and guidance, but no spirit of dictation. The new policy of development will involve no derogation from the rights and privileges of local legislatures, upon whom rests a large measure of responsibility for the improvement of conditions in their several territories and upon whose co-operation the Government will count with confidence. The whole effort will be one of collaboration between the authorities in the colonies





U.H. UNIV. LIBRY. SYSTEM



and those at home; there must be ready recognition that conditions vary greatly from colony to colony, and the colonial governments, who best know the needs of their own territories, should enjoy a wide latitude in the initiation and execution of policies."

#### On the Road to Self-government

This stress upon autonomy in each of the dependencies raises the question: how much self-government do the British dependencies enjoy? Here again there is the greatest variety and it springs from the variety in area, population, history and development of each of the territories. In some cases, native institutions are extensively used, as in Northern Nigeria, and there is in practice a considerable measure of self-government. In other cases where there are conflicting communities within the territory and a conflict of interests in which, very often, a minority would suffer, the grant of full self-government without any safeguards is regarded as unjust. Thus in Kenya restrictions upon self-government have been imposed and elaborate arrangements introduced within the system of government to safeguard or promote the interests of all communities. Each dependency has its own peculiar conditions and problems which explain its form of government and the degree to which it finds that form satisfactory.

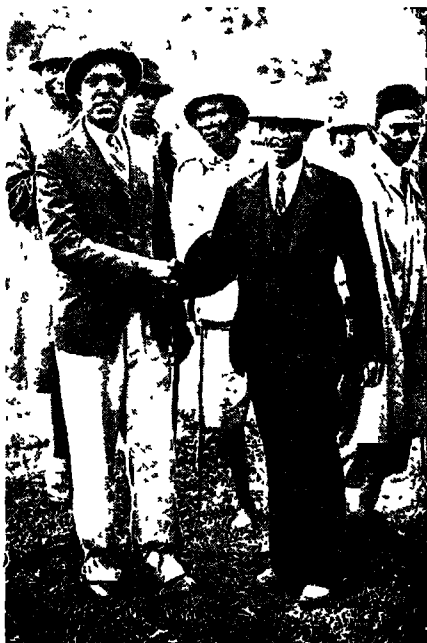
It seems worth while to consider the dependencies in terms of self-government. It is difficult to carry out a classification on these lines because it is hard to indicate briefly the extent to which some depen-

dencies are self-governing. They may appear on the surface to be completely controlled by officials of the Colonial Office and the Colonial Civil Service, while in practice a great degree of indirect rule through local institutions may be encouraged and practised. Or, on the other hand, they may possess the paraphernalia of considerable self-government, yet in practice they may not prove to be as autonomous as some territory which lacks these institutions. None the less an attempt will be made to classify the dependencies in terms of their degrees of self-government, imperfect as the picture must be. And it will be noticed that classification upon this principle cuts across the classification into protectorates, crown colonies and so on, already made. Dependencies of all types are to be found in different stages of development along the road to self-government.

We may start with dependencies whose government is in the hands of a governor or commissioner unaided by any form of executive or legislative council. This is

#### LOCAL ELECTIONS

*In most British dependencies every encouragement is given to the inhabitants' taking part in matters affecting their interests. Local government elections in Kenya are seen in these three photographs. Left (above) the voters assemble, each line led by a candidate for election. Left (below) the votes are reckoned by a counting of heads, a task undertaken by the district officer. Right, the victorious candidate and the loser shake hands after the result is declared.*





#### FIJI POLICE AT WORK

*Fiji police at work in the Criminal Investigation Department of the Central Police Station at Suva. Modern methods of detection are practised*

the simple, autocratic form of constitution. It does not mean that the governor is the only official administering government, but it means that he has sole authority on executive and legislative matters. There may be subordinate or local bodies charged with some authority but they derive that authority from the governor. British Somaliland and the British Solomon Islands, both protectorates, fall into this class, and also the Gilbert and Ellice Islands, which are a colony. In these three cases the population is scattered and organized upon tribal systems so that no elaborate central machinery has been thought either possible or necessary. In the case of the two Pacific examples, the British Solomon Islands and the Gilbert and Ellice Islands, the officers in charge of administration come under the control of the High Commissioner for the Western Pacific, who is also Governor of Fiji. In

all these cases, however, there is not much direct interference by British officials with the native systems of government. One might say, indeed, that the British element in the government of the dependencies was rudimentary, but the native element complex and far-reaching.

Then there are dependencies where the governor is assisted by a council, usually called an Executive Council. There is only the one council in the central government of the dependency and it is composed entirely or predominantly of officials. But in most cases where only one council exists, provision is made for some non-officials, members of the colonial community, to sit upon the Council. In this way the people of the dependency are associated, if only in a rudimentary way, with the machinery of government. Cyprus, Gibraltar and St. Helena are examples of dependencies with an Executive Council.

only, and in each case non-officials sit upon the Council. Newfoundland (mentioned briefly in the preceding chapter), which gave up responsible government in 1934 following a financial crisis, was in a somewhat similar position. Its administration was effected by a Governor and a Commission of six officials, each of whom was responsible for the administration of a department or service. But although the Commission in Newfoundland was composed entirely of officials, an attempt was made to associate the people of the island with the government by appointing three of the Commission officials from the United Kingdom, and three from the island itself.

In 1948 on a vote by the people, union with Canada was agreed to.

Dependencies with one Council only are rare. There is usually some reason for it. Thus in St. Helena it has been thought

that its small population can provide non-official representation upon one Council, but would not warrant the establishment of two. Gibraltar is a fortress under a military governor; it has a Legislative Council, but there must be an official majority over elected members. Cyprus has had internal disturbances and is for the time deprived of its Legislative Council. Newfoundland, after enjoying Dominion status with a bicameral legislature and responsible government, reverted, at its own request, to this extreme of dependent governance (see above).

Except in special circumstances, however, dependencies normally have two councils: the Executive Council which is responsible for administration, and a Legislative Council. And as a general rule non-officials are found upon all Legislative Councils and, increasing, upon Executive Councils. But it is upon the extent of



#### PROVINCIAL COUNCIL MEETING

*Members of the Provincial Legislative Council of the Gold Coast, West Africa, are here seen being addressed by the Provincial Commissioner of the Eastern Province at Dodowah. Observe the impressive staves carried by the chiefs.*

their representation that interest centres.

In the first class of dependencies with two councils, the representation of non-officials upon the Legislative Council takes the form of a nominated minority. Thus in Tanganyika there is a Legislative Council of twenty-three members, thirteen of whom are officials and ten are nominated non-officials. A similar system operates in certain other African dependencies—the Gambia, Nyasaland, Uganda and Zanzibar; it is found also in the Falkland Islands and in the Seychelles. In some of these dependencies non-official representation, again in a minority, is permitted upon the Executive Council. In Tanganyika, indeed, the Executive Council of six is composed of three officials and three non-officials, an attempt to associate the people with the government and to compensate, in this way, for the fact that there are no elected members upon the Legislative Council. In most of the dependencies of

this class the large native populations are unfitted for the ordinary elective system, though they are well able to operate institutions organized upon their own lines.

The elected element has been introduced into the Legislative Councils of certain dependencies, but here again an official majority is retained. But the non-officials are recruited by two processes, part by nomination, part by election, and in one or two cases the elected non-officials outnumber the nominated non-officials. This is the case in Kenya, for example. In Kenya, too, non-officials have sat upon the Executive Council since 1938 in equal numbers with officials. There is an Executive Council of eight, and of the four non-officials one represents the Indian community, one native interests, and two Europeans, and for these two European members it has been customary to choose the leader of the elected European members



MODERN SCHOOL IN NIGERIA

*Teacher and pupil at the Sokoto Middle School. A Nigerian province, Sokoto is an emirate, ruled by a progressive sultan. Nearly eight million Moslems live in Nigeria.*



#### IN A ZANZIBAR HOSPITAL

*The nurse looks on sympathetically as a mother visits her baby in the children's ward of a Zanzibar hospital. Health services play an important part in modern administration.*

upon the Legislative Council and the member of that council for Nairobi. A similar system (though with a smaller proportion of non-officials upon the Executive Council) has operated in Fiji and Sierra Leone.

All the dependencies mentioned so far possess the common characteristic that although many of them have non-official representation upon their councils, there is always an official majority. But there are some dependencies where the non-officials are in a majority on the Legislative Council. This is now the position in the Gold Coast and Nigeria under the constitution of 1946. There are many examples of this form also in the West Indies. In Trinidad, for example, there is a Legislative Council of eighteen. Of these three are officials and fifteen are non-officials, and of the fifteen non-officials, six are nominated and nine elected. In Trinidad, too, four of the elected members of the Legislative Council are appointed by the Governor to

sit upon the Executive Council and this provides a link between the two bodies. Similar systems exist in British Honduras, British Guiana, Dominica and the Leeward Islands for example with variations in the proportions of the different elements in the councils but with the principle of a non-official majority on the Legislative Councils always recognized.

In the West Indies also we find some examples of the old bicameral legislatures of the British Empire which were founded before the War of American Independence. They have survived as examples of what is usually called representative, but not responsible government. Barbados, Bermuda and the Bahamas all have bicameral legislatures. The upper house is called the Legislative Council and consists entirely of nominated non-officials and the lower house, the Legislative Assembly or House of Assembly, and is entirely elected. In the Bahamas and Bermuda non-officials

sit, in a minority, on the Executive Council. There is a convention in the Bahamas that three at least of these non-officials shall be members of the Assembly. In Bermuda the Executive Council consists of four officials and two or three members of the Assembly. Barbados has a different method of associating non-officials upon the legislature with the executive. It establishes an Executive Committee, which consists of the Executive Council plus one member of the Legislative Council and four members of the Assembly. This committee introduces government measures in the legislature and has the exclusive right of initiating money bills. It involves, as can be seen, a considerable measure of responsibility and autonomy for the non-official members, the representatives of the people of the colony.

#### West Indian Legislation

In 1944 Jamaica initiated some experiments in the association of non-officials with the administration which deserve some notice. Before 1944 Jamaica had had a Legislative Council with a non-official majority and with special safeguards that non-official and particularly elected members should have a considerable power of veto. By the constitution of 1944 a bicameral legislature was established, with a nominated Legislative Council and an elected Assembly, upon the same sort of pattern as that of Barbados, Bermuda and the Bahamas. Upon the executive side, however, bigger changes were made. Jamaica had had a Privy Council, which was in practice much the same as an Executive Council in any other colony. Under the new constitution, the Privy Council is retained, but it is confined to formal matters. There is created, in addition, an Executive Council which is to be regarded as the principal instrument of policy. The Executive Council consists of the Governor and ten members: five of whom are to be members of the House of Assembly, elected by that house to sit upon the Executive Council, of the remaining five three are to be officials nominated by the Governor, and two are to be non-officials, members of the Legislative Coun-

cil, also nominated by the Governor.

Certain features of this novel Jamaican plan deserve emphasis. There is first the fact of a non-official majority on the Executive Council. But that is not so striking as the fact that all the non-official members must be members of one house or the other of the legislature. There is thus a link between the two sides of government. Most striking of all, half the members are actually to be elected by the House of Assembly. There is here the beginnings of the notion of responsible government. People are to sit upon the Executive Council because they have the confidence of the elected branch of the legislature.

It is proposed, moreover, that the Assembly should divide itself up into five or so committees to deal with such matters as education, social services, agriculture and the like, and it is suggested—though it is not obligatory—that the chairmen of these committees might be the persons to be selected by the Assembly to sit upon the Executive Council.

Finally, the powers of the Executive Council are increased far beyond anything permitted to the former Privy Council. The Executive Council is to be associated with the Governor in preparing legislation for submission to the houses and it initiates all laws, financial and otherwise. It prepares the budget. The Governor has no more than a casting vote upon it. Should the Governor deem it necessary that certain legislation should be passed in opposition to the legislature, he may enact such legislation, but only in accordance with the advice of the Executive Council. In any case the exercise of this power must be reported to the Secretary of State for the Colonies, and it should not be undertaken without his prior approval, except in case of urgency. The Governor retains the power to veto bills, a power possessed by the Governors of all colonies. But it is understood in Jamaica that, on the rare occasions when the Governor might feel obliged to refuse assent to a bill, he would consult the Executive Council, and if this does not agree, the Secretary of State.

The Jamaican experiment is of great

interest. There sit, side by side, three officials—the Attorney-General, the Colonial Secretary and the Treasurer—and seven non-officials. In the Executive Council constituted after the elections of December, 1944, the five non-officials elected by the Assembly were chairmen of committees of the Assembly dealing with, respectively, labour and communications, finance, agriculture, social services, and education. It is clear that their proposals and policies will concern the three officials considerably, and that co-operation between both sides will be essential if the system is to work. If it does succeed, it may serve as a model for, say, other West Indian colonies where representative institutions exist but where control over administration has not gone so far. Where Jamaica has made an important innovation is not so much in the establishment of a non-official majority on the Executive Council, but first in securing that those chosen from the Assembly are actually elected by the Assembly, and secondly in assigning to these non-officials the responsibility for the administration of separate departments. Its Executive Council has gone a long way, in its direct responsibility to the Assembly and in its specialization, towards becoming a sort of Cabinet.

#### Racial Minorities a Special Problem

It is commonly felt that cabinet government is the natural criterion or characteristic of self-government. And it may be well here to remark that this assumption involves great difficulties. The problem involved can be illustrated best by a consideration of the Government of Ceylon, where a deliberate attempt was made—under the constitution of 1931—to make possible the exercise of self-government through a system which modified and almost rejected the cabinet model. In Ceylon they had reached the stage, by a reform in 1922, where they had an Executive Council with an official majority but a non-official nominated minority, and a Legislative Council with a non-official and elected majority. They desired a further advance in self-government, and in particular some control over administration.



VILLAGE HEADMAN IN CEYLON

*One-third of the population belongs to races other than Sinhalese, leading to difficulty in the way of fair representation of minorities. Ceylon has been granted Dominion status.*

The cabinet system seemed the obvious medium through which this control would be obtained. But here a difficulty appeared. The people of Ceylon are divided among themselves by differences of race and religion. About two-thirds of them are Buddhists, one-fifth are Hindus, one-tenth are Christians, and less than a tenth are Moslems. Rather more important are certain racial differences. Out of a population of six millions, about four millions



are Sinhalese, the remainder is composed of certain minority groups. There are nearly seven hundred thousand Ceylon Tamils and eight hundred thousand Indian Tamils, there are over four hundred thousand Moslems, the great majority of whom are Moors, though there are eighteen thousand Malays, there are thirty thousand Burghers, the descendants of the Dutch colonists, who though small in numbers play an important part in the public and professional life of the colony, and there are about ten thousand Europeans.

Now in the ordinary system of cabinet government, the practice is for the cabinet to be formed by the leader of the majority party and he includes in it only members of that party. The place and function of the minority is to be in opposition and out of office. Their turn for office will come when they get a majority. This system works in a country where majorities and minorities are not permanently fixed. But how does it apply in Ceylon? The political divisions there, it was claimed, were on communal lines. Elections would be conducted on that basis. Inevitably, therefore, there would be a Sinhalese majority on the Legislative Council and the Cabinet would be composed entirely of Sinhalese. The minority communities would be completely excluded from any share in the control of administration. They might have a few seats on the Legislative Council, but they would have none on the Executive Council or Cabinet. And it would be no good to say to them that when they became a majority they could themselves control the whole of the Executive Council, because they would never become a majority. The Sinhalese would clearly overwhelm them always.

#### Minority Fears

This situation of communal conflict and minority fears is not peculiar to Ceylon. It is a notorious feature of Indian politics and it is present in Malaya and Kenya. It begins to express itself as soon as non-official members come to be associated with the government of a dependency and it usually results, as in Kenya, in a certain number of seats in the non-official

group being reserved in legislative councils for the different minority communities, whether the non-official members be elected or nominated. And when the number of non-officials is increased to a majority and to an elected majority, this safeguard of reserved seats continues. In the same way, when non-officials are added in a minority to the Executive Council care is taken, again as in Kenya, that all important communities are represented. But the most difficult problem arises when it is proposed to give the control of administration to non-officials and the ordinary system of cabinet government, even for a limited range of local affairs, is adopted.

#### Donoughmore's Experiment

Faced with this dilemma in Ceylon, the British Government in 1927 appointed a commission under Lord Donoughmore to advise upon the best way in which the demand for self-government could be combined with the claims of minorities. The commission prepared an interesting scheme which, with some modifications, was brought into effect in 1931. There was set up a single chamber, the State Council which was to have both legislative and executive functions. It was required to divide itself up into seven executive committees, each of which was to elect a chairman, and these seven chairmen, along with three officials—the Chief Secretary, the Treasurer and the Attorney-General, who were called officers of state—were to form the board of ministers. Each executive committee was to have charge of a department or group of departments, and it would supervise the conduct of the administration.

Every member of the State Council would thus be associated in some degree with administration, it could not become the monopoly of a majority community. And it might well happen that one or two of the chairmen might be representatives of minority communities. All this assumed of course, that there would be some representatives of minorities on the State Council, and indeed if the scheme was to be acceptable at all there must be adequate

representation. The Donoughmore report recommended, however, the abolition of communal representation, which had been a feature of the previous Legislative Council, and the substitution for it of election under universal adult suffrage by territorial constituencies though with a power in the hands of the Governor to fill up to twelve seats by nomination if it were necessary to secure adequate representation of minority communities.

These proposals did not give much safeguard to the minorities, unless they could rely on nomination. But the British Government adopted the proposals with only a few modifications (e.g. it reduced the number of nominated seats to eight), and the first State Council elected in June, 1931, was composed of thirty-eight Sinhalese, three Ceylon Tamils, two Indian Tamils, two Europeans and one Moslem. The Governor filled the nominated seats with four Europeans, two Burghers, one Indian and one Moslem.

It is not possible to describe the working of the 1931 constitution. It is enough to say that it had been criticized since its inception. The principal ground of attack had been, however, not its provisions for safeguarding minorities, but the restrictions which it had imposed upon self-government in Ceylon. The whole range of internal affairs was not placed within the purview of the Executive Committees and their chairmen, the three Officers of State and the Governor had considerable powers by no means confined to external affairs.

There was therefore a strong agitation for increased self government and for Dominion status. There was linked with this much criticism of the machinery of government itself—of the system of executive committees with their confusion of responsibility and the opportunities they gave for obstruction. It is clear, too, that the minorities could feel that under a system of universal suffrage by territorial constituencies they did not receive as much representation as they had hoped for. In the end it was decided, in 1945, after a report by a Royal Commission under Lord Soulbury's chairmanship, that there should be a big extension of the scope of self

government and that a system of cabinet government should replace the system of executive committees. It is too early to say how this system will work, whether communal differences and minority discontents will become sharper or whether moderation will prevail. At any rate, on February 4, 1948, Ceylon entered upon Dominion status.

Opinions upon the value of the Donoughmore system vary. It may be suggested here that the system was much better than was generally realized. It was inevitably not given a fair trial upon its merits because the majority of political opinion in Ceylon was more interested in extending the area of self-government than in making the machinery of government work. Under conditions where the issue of the area of self-government is out of the way—whether by the grant of Dominion status or otherwise—the Donoughmore system of executive committees might prove most valuable, and it is to be hoped that it will not be regarded as completely discredited because it has now been superseded in Ceylon by the normal machinery of responsible government. In this connexion it is interesting to observe that the Jamaican constitution of 1944 embodies some part of the features of the Ceylon constitution of 1931-46 although the experiment of a single chamber legislature is discarded, the use of committees of the assembly is encouraged and the choice of the chairman of these committees as virtually, ministers of the services with which their committees are concerned, is envisaged and supported. But neither feature is obligatory in Jamaica as it was in Ceylon.

#### Variety and Change in Africa

From what has been said so far, it will be clear that there is today nothing static or stereotyped about constitutional arrangements in the British dependencies. Change comes very slowly, it must be admitted but it brings great variety and it never ceases. Proposals were made in 1944 to introduce an elected majority into the Legislative Council of the Gold Coast and in 1945 to introduce a non-official majority



A DISTRICT OFFICER

*The position of district officer is one of the most important in colonial administration*



AT WORK IN KENYA

*Above, a district officer in Kenya on his rounds hears complaints and cases outside his tent.*

into the Legislative Council of Nigeria and were carried under appeal in 1946. At the same time, in both dependencies, the proposals attempted to provide for a system of regional councils subordinate to the Legislative Council, by means of which the differing social structures of the different areas of the dependencies could be adequately represented and could obtain an opportunity of discussing their own affairs. Within the same government are combined communities organized on different systems—chieftainships and sultanates are combined with urban and Europeanized areas where political organization is on radically dissimilar lines. A mere increase in the number of non-officials upon a Legislative or Executive Council cannot touch deeply the problems of government in such dependencies.

#### Power of the Colonial Office

In the discussion of dependencies according to their degree of self-government no mention has been made so far, except in passing, of the control over colonial affairs exercised by the British Government through the Secretary of State for the Colonies and the Colonial Office in Downing Street. Our attention has been concentrated upon machinery in the dependency, upon the Governor and the officials under his control and their relation to the non-officials, inhabitants of the dependency, who are associated with the machinery of government through membership of the Legislative and Executive Councils.

But bear in mind that the Governor is not an independent sovereign. His powers are exercised under the control of the Secretary of State, and it is this last officer who is responsible to the British Parliament for the conduct of the affairs of the British dependencies. The Governor receives instructions from the Secretary of State to refuse assent to bills, to reserve bills for the signification of His Majesty's pleasure, to introduce bills, to promulgate legislation himself. There is a code of colonial regulations laying down in considerable detail the way in which business in the dependencies is to be conducted,

how a budget is to be prepared, how accounts are to be audited, and how the Secretary of State's approval must be first obtained before a dependency's financial proposals can come into effect. In practice control may not be so close as it could be in law.

There has been since 1918 an increase in the activity of the Colonial Office in London in urging upon colonial legislatures certain kinds of legislation. Model ordinances are sent out dealing with such subjects as workmen's compensation, the legalizing of trade unions and the introduction of income tax. A great impetus to this form of control has come from the adoption in 1940 of the colonial development and welfare policy, through which grants are made to the dependencies not merely for economic development but also for the provision of social welfare services. With these grants go conditions, and among the conditions has been the enacting of certain kinds of social legislation. The Colonial Office claims that it does not require excessive uniformity or rigidity in these matters, but it has realized that one way of ensuring development and welfare is to insist that, before money is made available for such schemes, the minimum legislative requirements necessary for achieving the policy which the money is to finance must be enacted.

#### Regionalism

When development and welfare come to be considered in a dependency, it becomes clear quite soon that before plans can be made the dependency's relations to its immediate neighbours or to the rest of the British Empire or to its main markets or to the outside world generally must be considered. The development and welfare of a dependency can seldom be achieved in isolation. A good illustration of this fact was the appointment by the Colonial Office of a comptroller of development for all the British West Indian dependencies, Sir Frank Stockdale, whose task it was to consider, and to see that each dependency considered, its plans in the light of the resources and needs of its neighbour. Among the ideas which this wider con-

sideration of a dependency's position brings to light is regionalism. In these days there is a great deal of discussion of regionalism for the British Empire, and it is well to notice to what extent it has been adopted. Three interesting examples of its development are East Africa, West Africa and the Caribbean.

In East Africa there has been discussion for many years about the possibilities of and the necessity for, closer union among the British dependencies there, and in some cases between British dependencies and those of other Powers. The British territories, however, are by no means homogeneous in social structure or in political organization. Zanzibar is a protected state under an Arab sultan. Kenya, a colony and protectorate, has its European settlers, its Indians, its Arabs and its native population. Tanganyika, a mandated territory, has its settlers, but it is more certainly an African country. Nyasaland, a protectorate, is clearly an African country. Northern Rhodesia, a protectorate, occasionally brought into the regional picture has its special problems of the copper industry and, moreover, it looks towards other parts of Africa to its south. Uganda, another protectorate, has its own political system of native rule on a higher range of development than in any of the others.

Varieties of closer union have been advocated—federation, co-operation, consultation—and committees of inquiry have considered the question. Already some measure of functional union exists. There is a common customs and excise service, a common postal service and a common currency between Kenya, Tanganyika and Uganda. During the war further joint institutions were established, in particular War and Civil Service Supply Boards and a transport board. For a long time there has been a conference of the Governors of these dependencies and the Resident at Zanzibar, meeting regularly to discuss matters of common concern.

In 1945, the Colonial Office proposed a further step towards inter-territorial organization. It envisaged the establishment of an East African High Commission consisting of the Governors of the three

dependencies, Kenya, Tanganyika and Uganda, a central legislature, and an executive organization assisted by advisory boards. The central legislature would have a non-official though not an elected majority—five officials, twelve elected non-officials, six to be Europeans and six Indians, chosen by the legislatures of the three dependencies, six nominated members, as many as possible of whom were to be Africans, chosen by the High Commissioner, two members to be nominated similarly to represent Arabs, and four other nominated members.

What power was this central legislature to have? It is to be entitled to make ordinances effective throughout the three dependencies, but it cannot deal with a bill unless all three Governors agree upon it, and there is thus no surrender of legislative power by any of the dependencies. Nor can unofficial members introduce bills, though they may move motions. There is to be an executive for the organization, however, so that it does not rely upon the executives of the individual dependencies. The scheme proposed was, therefore, a kind of confederation, in which the general legislature is to be subordinate to the local legislatures. It is not a legislative union strictly so called. But it represents a big move towards closer union. It was received with strong opposition from Europeans in Kenya and it remains to be seen whether it will come to operate smoothly and successfully.

#### Developments in West Africa

In West Africa development upon different lines is proposed. In 1939 a West African Governors' Conference was initiated, with the Governors of the four dependencies of Sierra Leone, the Gambia, the Gold Coast and Nigeria as its members, and with the Governor of the dependency in which the Conference was meeting as its chairman. In 1942, under the stress of wartime problems, the British Government appointed a Resident Minister in West Africa, with an office at Accra, the capital of the Gold Coast. The Minister came to consider also questions of post-war development in the dependencies, and



#### HOUSING IN WEST AFRICA

*Progress in administration is being made rapidly in West Africa. Above, Mr. E. Maxwell Fin, town-planning adviser, with two of his assistants. Below, a house on the Accra estate.*



in 1943 a town-planning adviser and a development adviser were appointed to his staff

With the end of the war the office of Resident Minister was dropped, and instead on the initiative of the Colonial Office there was set up a West African Council. This is composed of the four Governors, but it differs from the former Governors' Conference in two important respects. First of all it is presided over by the Secretary of State for the Colonies himself or, if he is unable to attend, by a Parliamentary Under-Secretary of State. Secondly, it has a permanent secretariat under a senior official from the Colonial Office. Its headquarters is established in or near Accra. It is proposed also that the chiefs of the three fighting services in the region should be associated with the council, not as full permanent members, but as advisers from time to time. This organization, it is clear, is on a different pattern from that for East Africa. It is official rather than non-official in its composition, it is not representative, it is more rudimentary as a political institution. It remains to be seen whether it fits into the special situation of the West African dependencies.

#### Caribbean Developments

In the West Indies an interesting new development is to be noticed—the association in a regional organization of the principal colonial powers of the Caribbean area. There is, of course, the distinct problem of closer union for the British West Indies, and that has a history of its own, going back well before 1939 and issuing in 1947 in a conference to discuss federation of the colonies. But during the war years there came into existence the Anglo-American Caribbean Commission, established in 1942, and originally concerned chiefly with the ensuring of food supplies in the area under the threat of the submarine campaign.

But it was also intended to be a permanent and peacetime organization, to strengthen co-operation in social and economic matters between the United States and its dependencies and the United King-

dom and its dependencies. It held in March, 1944, a West Indian Conference intended to be the first of a series, in which representatives of the dependencies discussed matters of common interest. In 1945 it was announced that the French and Netherlands Governments had agreed to join the Commission, and by their accession there came into existence a comprehensive regional organization which is unique in colonial administration. Whatever form of regional organization may be found suitable for any group of British dependencies alone, it seems certain that some wider organization to include all dependent territories, of whatever Power, in an area, should exist, and the Caribbean Commission gives a working example of what can be done.

#### British and other Dependencies

Its operation will be the more interesting to watch because the British dependencies concerned are, for the most part, well advanced upon the road to self-government, and the effect of this co-operation with the dependencies of other Powers should produce interesting mutual reactions. It may be mentioned that the British and American representation upon the Commission was increased from three to four in 1945 so that an unofficial representative of the dependencies of each Power could be included.

In the British West Indies themselves the problem of federation or some other form of closer union has been constantly discussed and frequently investigated by commissions. There is a great reluctance on the part of most of the dependencies to join together. Some groups have been formed into federations: the Leeward Islands is one example. But for the British region as a whole nothing has yet been achieved comparable even to the Governors' Conferences of East Africa and West Africa. A dispatch from the Secretary of State in 1945 recognized that federation was still a long way off but reiterated that it was an end to which policy should be directed and the conference of 1947 took the study of the subject a stage further. Yet it is to be emphasized that the British West Indies



do not form so compact a region as does either East Africa or West Africa, and, most important, the dependencies are separated by sea, an isolating influence still strong in spite of the development of air transport

A word may be said in conclusion of relations among the dependencies of the whole Empire. Here the chief institution for common discussion has been the Colonial Office Conference, initiated in 1927 by Mr. Amery, then Secretary of State. It was composed of Governors and other official representatives of the dependencies. It was an official conference, but it published a full report of proceedings and conclusions. The Secretary of State presided. The conference was held again in 1930. It is not yet established as a regular institution, with frequent meetings, but a meeting including both officials and non-officials was planned for 1948.

That such an institution is needed there is no doubt, but it may be suggested, perhaps, that it is in regional conferences and councils, especially where non-official representation can be obtained, that the most valuable discussion of common interests can be obtained at present. The British Empire is scattered so far about the world, and its dependencies vary so much, that a general meeting has only a limited usefulness. Pending the development of such a system of conference, and indeed even if such a system should be set up, it is upon the British Parliament that there rests the responsibility of seeing that matters which affect the welfare and security and just treatment of all the dependencies of Britain are rightly ordered and progressively administered.

#### Mandated Territories

It is proper to consider at the end the relation of this British dependent Empire to the outside world. An occasional reference has been made in passing to certain territories held by Britain as mandates, although no detailed explanation of their status has been given. It may be well to say that Britain has held mandates for Palestine and Transjordan, for Tanganyika, part of the Cameroons

and part of Togoland, the first two being former territories of the Turkish Empire, and the remainder portions of the German Colonial Empire. After the First World War a system of mandates was set up under the Covenant of the League of Nations by which former enemy territories were to be held and administered in trust by certain of the Powers. Britain was one such Power, and the mandated territories confided to her were, let it be emphasized, not annexed, they were not made part of the British Empire, they were more like protectorates. But they differed from ordinary protectorates in that Britain was required to report annually to the Permanent Mandates Commission of the League of Nations upon her administration of the trust, and to submit to questions and criticisms concerning its stewardship.

This was no nominal proceeding in practice, but a real supervision. These mandates were, in a sense, British dependencies, and they have been mentioned as such during the exposition of this chapter. But it is well to emphasize their special position and to stress that they are dependencies which bring Britain and her policy before the opinion and the institutions of the world at large.

#### United Nations Charter

This principle of a trusteeship on behalf of the whole world has been made even more explicit in the Charter of the United Nations. In Chapters XII and XIII of the Charter provision is made for the establishment of an international trusteeship system which, through a Trusteeship Council, shall seek "to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned."

The territories which may be brought within the trusteeship system are the mandated territories, territories which were detached from enemy states during the

Second World War, and any territories voluntarily placed under the system by the states responsible for their administration. The trust territories will be administered under a trusteeship agreement, and the authority which will exercise the administration of the trust may be one state or more than one state or the whole United Nations Organization itself.

The Trusteeship Council of U N O has powers similar to those of the Mandates Commission of the League of Nations. What is its function? It is to consider reports from the administering authorities, to accept petitions and examine them in consultation with the administering authorities, to provide for periodic visits to the respective trust territories at times agreed upon with the administering authorities, and it is to formulate a question-

naire on the political, economic, social and educational advancement of the inhabitants of each trust territory, upon the basis of which the administering authorities are to make their annual reports. Much of this resembles the powers of the Mandates Commission, but on the whole the Trusteeship Council appears to be possessed of rather stronger weapons.

As the system is new it is too early to say how extensive will be the territories placed in its charge or how faithfully and progressively the trust will be discharged. But when Britain announced that she proposed to transfer her mandated territories to the trusteeship system she took the lead in this matter. In so doing she continues to emphasize what has been for long the accepted principle of British policy towards the dependencies.

### *Test Yourself*

- 1 What is the distinction between a colony and a protectorate?
- 2 Give an example of a "condominium".
- 3 Does the history of the British Empire support the view that "trade follows the flag"?
- 4 What great change in British colonial policy took place in 1940?
- 5 What is the status of Newfoundland?
- 6 What is a "bicameral" legislature?
- 7 What is the distinction between "representative" and "responsible" government?
- 8 How does the existence of communal divisions in a colony affect its progress towards democratic self-government?
- 9 What is "mandated" territory?

*Answers will be found at the end of the book*



#### LAST VICEROY OF INDIA

*Lord Mountbatten, last Viceroy of India, arbitrator in the division of the continent into two separate Dominions, India and Pakistan, and first Governor-General of the Indian Union*

## CHAPTER X

# LAW AND GOVERNMENT IN INDIA

IN India the movement towards democratic government, towards Western conceptions of law, has been imposed upon peoples alien in race, with a civilization already ancient "when all our fathers worshipped stocks and stones," and with the slightest experience in their past history of any but personal and autocratic rule. Canada, Australia, New Zealand and South Africa were all alike in that when it came to the discussion of new forms of rule the populations that desired these were European in origin, and had carried to their new lands Western thought as to political development. India had no such previous experience on which to build. Even the conception of nationality that springs from a single sovereignty had been denied her prior to the assumption of power by the British, and British rule, when finally established, left the vast area of the Indian States, with a quarter of the population of the country, to the personal rule of the Princes.

Sir Henry Maine in his researches into the early life of the Aryan people, who were the first recorded invaders of India, finds traces of institutions that might have developed into some form of popular government. All that survived of these were the village councils or panchayats that debated and decided local matters, and for practical purposes these are almost dead. They were, as Lord Halifax has written, "the arrested germs, as it were, of Parliaments that might have been, and now the object of scientific study, much as atrophied organs in the human body, which were once vital parts in the structure of ancestors very different from ourselves, today engage the attention of physiologists."

The wilting of these primitive institutions is easy to explain. Between the highly developed civilization of the Maurya dynasty, which reached its height in the reign of Asoka centuries before the

Christian era, and the final establishment of British rule, India was subject to wave after wave of invaders each establishing its own area of conquest and power, each bringing its own institutions and sweeping away much of what had gone before. Ever subject to rapine and the upheaval of its internal life, India was denied the opportunity of development until it fell under the strong rule of the Mogul conquerors, whose dynasty, splendid in the days of Akbar and Shah Jehan, was destined in its turn to fall into decay in the eighteenth century, with attendant chaos and anarchy.

### Caste System

The tragedy of India was that the various peoples who, throughout the centuries occupied the land, never merged with one another but remained separate and apart. For that continuing division its rigid caste system has the main responsibility. Hinduism, a religion of many gods and a faith that ranges from pure idolatry to a high philosophy that recognizes one Supreme Being, finds its strength in a social creed regulating the life of all its adherents and dividing them into particular strata. Mankind is classified in four main divisions—the *brahmin*, teacher and law giver, the *kshatriya*, the warrior, the *vaisha*, the trader, and the *shudra*, or serving caste. Outside these are the Untouchables, or Scheduled Castes, as they are now named, condemned to live apart in the villages, to perform all the more menial tasks, whose very shadow may be pollution to the caste Hindu. In course of time there has been an almost infinite division of the four main castes, according to occupation, until they are numbered by thousands.

Orthodox Hindus must not marry those of other religions, nor marry or eat outside their caste. Social life is determined by the fact of birth. There is no escape from pre-arranged destiny in this life, only the hope

that in some future existence there may be birth into another and higher caste. The system is not without its advantages. It gives to each his settled place; the son follows the father in his occupation and fills his due niche in the life of the community. But its main effect in modern India has been to keep the Hindus, by far the most numerous section of the population, separate from every other element—a nation in themselves but without such attributes of nationhood as a common language, or a clear line of descent from common ancestors. In modern India, however, the rigidity of caste has been inevitably modified by life in the greater cities, by travel in railway trains, omnibuses and tramcars, although in social life it still remains dominant. In days of democratic stirring the communities of India, both within and without Hinduism, asked into whose hands rule might eventually pass. That question dominated the political life of India.

#### Impact of Western Law

Before entering upon that wider aspect of Indian government we may examine what has been claimed as a major achievement of British rule—the replacement of despotic rule by a system of law that offers impartial justice to all and the widest measure of civil liberty. How far it was wise to transfer to an Eastern land the principles and practices of Western law is to this day a matter of dispute, but one of diminishing importance, since for generations the courts in India have administered forms of law with which the people have become familiar and in which the whole body of lawyers has been trained. Moreover, Western law has never wholly superseded that of the East. It was declared as early as 1831 by a parliamentary committee “that the interests of the native subjects are to be consulted in preference to those of Europeans whenever the two come into competition and that therefore the laws ought to be adapted rather to the feelings and habits of the natives than to those of Europeans.” Thus it comes that in the codes of law of India, English practice and English theory are imposed upon, rather



ROBERT, LORD CLIVE

*Clive was largely responsible for founding the British Empire in India through his victories for the East India Company*

than superseding, the ancient Hindu and Moslem laws. These still hold in regard to such matters as marriage, inheritance, land tenure and a wide field of social customs.

When the East India Company first established its trading posts its servants were, naturally enough, subject to English law, but the jurisdiction of the courts that were set up could not extend beyond the narrow confines of the posts themselves. With the Battle of Plassey in 1757, victory in which gave the Company virtual rule over the whole of Bengal, final authority rested in the British Parliament, from which the Company derived its powers. By the Regulating Act of 1773, Parliament decided the manner in which the new possessions were to be governed. The immediate interest of the change is that a Supreme Court was created whose jurisdiction, both civil and criminal, was to extend to all British subjects in the Provinces of Bengal, Bihar and Orissa. The court consisted of four British judges, with Sir Elijah Impey as Chief Justice. The Regulating Act was

ambiguous. It did not define a "British subject," nor did it state what law was to be administered by the court. Inevitably the tendency of the judges was to give a wide interpretation to their powers. They were trained in English law and knew no other. For them the law was, in the description later given to it by Sir Courtenay Ilbert, "the unregenerate English law, insular, technical, formless, tempered in its application to English circumstances by the quibbles of judges and the obstinacy of juries, capable of being an instrument of the most monstrous injustice when administered in an atmosphere different from that in which it had been administered."

Under that law, Nuncomar—more properly, Nanda-Kumar—the enemy of Warren Hastings, who had become an instrument of the opponents in the Council of the Governor-General, was tried for forgery, condemned and duly hanged. Apart from the fact that Nanda-Kumar was a *brahmin*, the execution shocked all Indian feeling, for while forgery, under the harsh law of the England of the day, was a hanging matter, in Hindu eyes it was little more than a peccadillo. English law in many of its phases was repugnant to Indians' sentiment, but was applied and gradually extended. Yet, as has been said, it was modified in various respects. In matters of inheritance and succession to lands, rents and goods, or where contracts and dealings were concerned, the special traditional laws of India were retained. Where both parties were Hindus disputes were to be decided by the laws and usages of Hindus; where both parties were Moslems, by the laws and usages of Mohammedans, where the parties were of different faith, by the laws and usages of the defendant. That system, with occasional modification, has endured through all changes, and in India even today in civil cases the courts interpret three different systems of law.

#### Indian Penal Code

With all its defects, and subject as it may be to criticism, the riveting of English practice upon India gave to the country a rule of law as opposed to the autocratic rule of the past. Unsuitable as it may have been

to the backward conditions in the Indian villages, it ensured for the first time the impartial administration of an impersonal justice. Advocates of the change have claimed, not without warrant, that the application of English law to India, altered as it has been, as in England, by changing circumstances and milder sentiment, is the greatest benefit that British rule has conferred upon the country and may be its most enduring legacy.

Law in India has been carefully embodied in codes, subject to modification by the large body of legislation, either originating in India itself or applied to India by the British Parliament. The Penal Code, drafted in 1835 by a committee of which Lord Macaulay was the outstanding member, was not brought into actual operation until 1860, after the government of India had been finally transferred from the East India Company to the British Crown. It was supplemented by a Code of Criminal Procedure in 1861. Of these enactments, Sir James Stephen, one of the most eminent lawyers who ever went to India, said: "The Indian Penal Code may be described as the



WARREN HASTINGS

*First Governor-General of British India after Clive's victory, Hastings's administration was criticized by English politicians*



IMPERIAL SECRETARIAT, NEW DELHI

*Designed and built as the capital for all India, New Delhi contains many handsome modern government buildings of which the Imperial Secretariat is one*

criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India. It is practically impossible to misunderstand the code."

#### The Courts and Their Functions

This simplicity and precise direction as to procedure is of prime importance under a system in which thousands of inferior courts throughout the country are presided over by men without legal training, many of them selected from the Civil Services, and others appointed as honorary magistrates. Although understanding of the system is frequently made difficult to the English intelligence by the use of terms drawn from Indian languages, the organization of the courts follows closely the English practice. For criminal cases there are courts of magistrates in the first instance, and cases from

these may be committed to the courts of session whose jurisdiction may cover an area as large as an English county. These courts of session fill the place of the English assizes, differing from them in the fact that they are stationary. Their powers are limited only in one direction. Sentences of death are subject to confirmation by the High Court of the province. In the courts of session the judges sit either with assessors or juries. The judge is not necessarily bound by the opinion of the assessors who sit to advise on questions of fact. With juries the opinion of the majority prevails, if accepted by the judge. Indian practice does not demand a unanimous verdict from the jury.

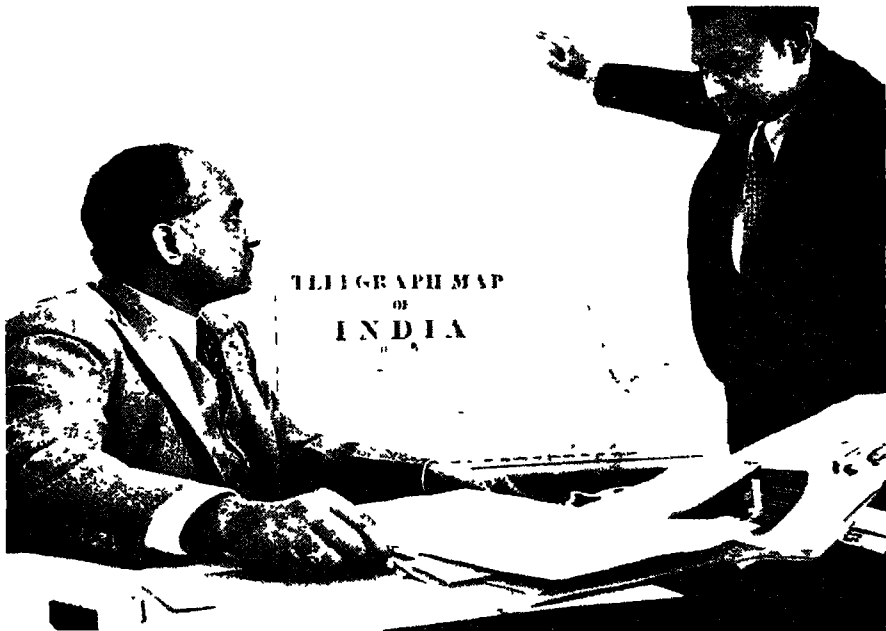
Civil cases are tried in the first place in the courts of *munsifs*—the lowest grade of judge—or by what are known as subordinate judges. From these they may go to the District Judge, who is ordinarily, whether British or Indian, selected from the Civil

Service. Below the District Court practically all judicial appointments are held by Indians. For the trial of small monetary suits there are Small Cause Courts dealing with matters involving an amount not exceeding five hundred rupees (£37 10s 0d.) The Small Cause Courts of Calcutta, Bombay and Madras can dispose of money suits up to two thousand rupees (£150) Cases of insolvency are under the jurisdiction of the High Courts in Calcutta, Bombay and Madras; in the rural districts they come before the District Courts.

In civil cases there is a system of appeal from lower courts to higher courts, to the High Courts themselves, and since recent changes, to the Federal Court of India, similarly, in criminal cases there are elaborate provisions for easy appeal, the High Court being the appellate court for the gravest type of case. The prerogative of mercy is exercised by the Governor-General in Council, without

prejudice to the superior power of the Crown

The legal procedure of the early days of the Regulating Act was followed by the creation of High Courts, sometimes under another name, for each of the eleven provinces into which India was divided by the Government of India Act of 1935, and by the setting up of a Federal Court, which has been brought into existence although the other provisions for the setting up of a federal constitution which the Act contained have not yet taken effect. Already this Federal Court has furnished an instance of the supremacy in legal affairs of the judiciary over the executive in its decision in 1942 that a rule drafted by the Central Government was *ultra vires*, that is to say, in excess of the Government's constitutional powers. Nothing could show more clearly that in India, as in England, the courts jealously preserve their independence *vis-à-vis* the Executive Government.



#### INDIANS IN GOVERNMENT SERVICE

*Since long before the granting of Dominion status, much of the administration of Indian affairs has been carried on by Indians themselves. Civil servants, such as those seen here, are drawn from men of university training after special examination*



Until the passing of the Government of India Act of 1935 a fixed proportion was observed in the appointment of judges to the High Courts. One-third were barristers, whether British or Indian, with English qualifications, one-third were drawn from the judicial branch of the Indian Civil Service, and one-third from lawyers qualified in India. This fixed proportion has now been abolished. While in the early days of British rule all judges of the High Court were British, with British qualifications, today Indian judges are in the majority, and the number of British administering justice tends rapidly to decline. So, at the Bar, the former preponderance of British barristers has been replaced by an overwhelming majority of Indians who have either qualified at the Inns of Court, or are *wakils*, lawyers with Indian qualifications and a licence to practice before the High Courts.

#### Legal Developments

While in the lower courts proceedings are conducted in the local vernaculars, in higher courts the language is English. This difference is necessary in a country of many tongues, but it involves much delay since every spoken word has to be interpreted to litigants who frequently have no language but their own. Law tends to be both slow and expensive where there are many opportunities of appeal, but neither consideration diminishes the flood of litigation. In most of the provinces a considerable addition to the revenues is made by court fees and fines. India, it has been said, has a love of going to law.

In at least one direction the imposition of English law has accentuated an evil in Indian life. The power to recover debts by court proceedings has strengthened the hold of the money-lender upon the *riot*, or peasant, who is his debtor. Much land has thus been alienated from the peasants, and in general the ryots groan under a load of debt. When, as in the past, decisions as to the justice of a debt depended upon the arbitrary word of a ruler or his subordinate officials, the money-lender was more reluctant to press his claim.

The Code of Civil Procedure, admirably

enough in the middle years of the last century, has undergone considerable revision in the present century, due to a great accumulation of new statutes. The hope has been expressed that a committee on Statute Law Revision will become a permanent feature of administration. A large body of factory, trade union, and social legislation has been passed within recent years—India in this respect keeping step with Great Britain. Codification and simplicity in explanation are of prime importance in a land where so many people are illiterate. The Financial Commissioner of the Punjab, writing so long ago as 1899, speaks of the country being “deluged with a flow of intricate, technical and sometimes even mischievous Acts the want of which has never been felt and the meaning of which is a frequent subject of remunerative dispute to those who live by the law. Hardly any such Act passed between 1870 and 1894 is comprehensible to the layman.”

All that has here been written of the law applies specifically to British India, and not to the Indian states, the rulers of which numbering a quarter of the population among their subjects, enjoy control of the internal affairs of their territories. In general it is true that the major states have come into line with British India in administering the law and have established courts that follow the English practice, modified by local custom, but the final appeal is to the ruler, as it was formerly in the days of Mogul ascendancy.

#### The Police

Behind the administration of the law in every country are the police, responsible for the security of life and property and the prevention and detection of crime. In India the police are a provincial force and not a municipal body. Each of the provinces has its own police, paid for out of the revenues of the province. In centralization the Continental practice rather than the British has been followed. Where, as in Calcutta, Madras and Bombay, there are separate police organizations, these are still paid from provincial funds.

The Indian police force numbers some two hundred thousand men, of whom, at

the time of the transfer of power, some four hundred of the officers and eight hundred sergeants were British. Large as the total number may seem, this body is responsible for the welfare of nearly three hundred million people. One policeman to one thousand five hundred inhabitants may be contrasted with the strength of the London police with one policeman to fewer than five hundred of the population. Necessarily the main strength is concentrated in the more populous areas, the local unit of control being the district, of which there are some two hundred and seventy in India, with an average area of four thousand square miles.

Contrary to a widespread belief the police in India are not armed, although on occasion they carry heavy bamboo staves, corresponding to the truncheon of the British policeman. At the headquarters of each district is a small body of armed police held in reserve and used in the main for escort and guard duties. These men are called upon in the case of disturbances in which their unarmed colleagues, always heavily outnumbered, are in danger of being overwhelmed by a mob.

On the whole the police in India are not popular. For long they were regarded as the instrument of a foreign power or, in the language of the Indian Statutory Commission (the Simon Commission) of 1930, "as the minions of an alien bureaucracy." Control of the police, as of other aspects of law and order, was, by the Act of 1935, transferred to the Indian Ministries of the provinces. As yet it cannot be said that the change has resulted in the greater popularity of the force, which has still the same duties to perform. Cost has often been a matter of criticism. It amounts to no more than 8d. per year per head of the population, and for all India is almost exactly the same as that of the London Metropolitan force, with but a tenth of its strength.

#### Village Watchman

Beyond the police force there is the *chowkidar*, or village watchman, who survives from Mogul days. He is a government official, rather than a policeman, and one with varied duties. He reports crime,

gives assistance to the police when necessary, keeps a careful eye upon known bad characters. These village watchmen are quite frequently recruited from castes that are criminal by heredity and, strange as it may appear, the plan works well, for such a man knows whence trouble is to be expected. The watchmen as a whole have a notable record of integrity and courage, and the officials in contact with them have a high regard for their character and their effectiveness.

Law, its machinery, and its methods of enforcement are but one phase of the changes wrought by British rule in India. The history of British government falls into separate chapters, each distinct in itself. Beginning with virtual control by the trading corporation known as the East



#### A CENTURY AND A HALF AGO

*To the late eighteenth-century European engraver the Indian-born soldier, or sepoy, a member of the British Indian Army, looked like this*



#### NORTH-WEST FRONTIER GUARDSMEN

*The north-west frontier country of India has always been a troubled land. The mountains are the home of fierce highland tribes to whom the towns of the plains offer spoils, and part of the British task in India was to keep the peace there.*

India Company, we see the British Parliament gradually asserting with more emphasis its determination to be master of the destinies of the country and by a series of Acts increasing its responsibility. This period lasted until the suppression of the Indian Mutiny in 1857, from which time the East India Company passes from history and control is centred in the British Crown.

From 1858 onward to 1909, the framework of the new administration is being built up, arbitrary rule being gradually tempered by somewhat timid experiments in representation of the people. With the Act of 1909 there is provision for fuller representation, followed in 1919 by what are known as the Montagu-Chelmsford Reforms which established partially responsible government in the provinces. By 1937 full responsibility in the provinces is conceded, wholly Indian Ministries controlling affairs in legislatures elected on a popular franchise. In the same Act of

Parliament (Government of India Act, 1935), provision was made for a federation of all India, including the Indian States, but for reasons to be presently explained, this part never came into force. The Central Government of India remained as before, with two legislative chambers elected on a limited franchise, but an executive not responsible to the legislature.

#### Royal Proclamation

The opening of the first chapter in 1858 was marked by the oft-quoted Proclamation of Queen Victoria:

"We declare it to be Our Royal Will and Pleasure that none be in any wise favoured, none molested or disquieted by reason of their Religious Faith or Observances; but that all shall alike enjoy the equal and impartial protection of the Law. and We do strictly charge and enjoin all those who may be in authority under Us, that they abstain from all interference with the Religious Belief or Worship or any of Our

Subjects, on pain of Our highest Displeasure

"And it is Our further Will that, so far as may be, Our Subjects, of whatever Race or Creed, be freely and impartially admitted to Offices in Our Service, the Duties of which they may be qualified, by their education, ability, and integrity, duly to discharge."

Many observers of the Indian scene have held that in this abstention from interference with religious customs has lain a weakness of British administration, although certain practices out of accord with modern Indian ideas of right living have been stopped

#### Developing Responsibility

During the next fifty years we see the gradual improvement and completion of the administrative machine, and the introduction of the policy of giving Indians some small voice in policy and a larger share in the day to day work of government. There is a background to the Indian complaint that the promises of the Queen's proclamation were slow in maturing, since it was long before any considerable number of Indians were admitted to the higher ranks of the administrative services, but even in the days of the East India Company, and more certainly after its disappearance, the bulk of the minor servants of the Indian Government were Indians

It could not be otherwise since the British personnel never exceeded some four thousand, and it has gradually been reduced to a very much smaller part of the more than twenty-five thousand employees of government engaged in administrative duties

That contrast of numbers induced Lord Curzon, when Viceroy, to claim that it revealed "a European system of government entrusted largely to non-European hands, what is called a subject country, though I dislike the phrase, administered far less by the conquering power than by its own sons"

Down certainly to 1909, and perhaps for another ten years, the form of government in India was an autocracy—a benevolent autocracy it may be claimed, but still an autocracy. Yet as early as 1861 the Indian

Councils Act provided for the dilution of the Governor-General's Legislative Council by six non-official members and some seats were given to nominated Indians

#### Representative Government

In 1892 a system of recommendation by various public bodies of members to fill the seats on an enlarged council was adopted and more Indians obtained places. This was the beginning of indirect election. With the Morley-Minto Reforms of 1909 we have the first attempts at actual representative, but not parliamentary, government

By the Indian Councils Act of 1909, passed when Lord Morley was Secretary of State for India, the official members in the Provincial Legislatures were outnumbered by the elected and nominated members. In Bengal elected members were a majority of the Council. At the centre a small official majority was retained, but in the Provinces and at the centre alike the governing bodies—the Executive Councils, which are the Cabinets of India—remained irresponsible to the Legislatures and irremovable by their adverse vote. Lord Kimberley, who had himself been Secretary for India, could repudiate any idea that parliamentary government was being conferred on India. "The notion," he declared, "of parliamentary representation of so vast a country is one of the wildest imaginations that ever entered the mind of man." And Lord Morley could calmly assert in the House of Lords, "If it could be said that this chapter of reforms led directly or necessarily to the establishment of a parliamentary system in India I, for one, would have nothing at all to do with it." Ten years after that utterance the parliamentary system, in somewhat rudimentary form, was established.

#### Moslem Minority

In one respect the Act of 1909 introduced into Indian life a mode of representation destined to have enduring effects upon the political antagonisms of the land. It provided that the Moslem minority should have a fixed number of seats and the Moslem members should be elected not on a general register, but on a register of Moslems alone.



**PANDIT JAWAHARLAL NEHRU**

*Former leader of the Congress Party, Pandit Nehru became the first Prime Minister of the Dominion of India*

Such a departure was wholly undemocratic. Lord Morley agreed to the innovation with reluctance, but he had no option if there were to be reforms at all. The Moslems, conscious of their numerical inferiority to the Hindus and fearful that all power would pass into the hands of the majority community, would have no hand in the change unless their position was safeguarded.

A further stage in India's political advance came with 1919, after the First World War, in which Indian soldiers had played a conspicuous part. It was preceded in 1917 by the announcement made in the House of Commons by Mr. Edwin Montagu, then Secretary of State for India. The outstanding passage read:

"The policy of His Majesty's Government, with which the Government of India are in complete accord, is that of the increasing association of Indians in every branch of the administration and the

gradual development of self-governing institutions with a view to the progressive realization of responsible government in India as an integral part of the British Empire. I would add that progress in this policy can only be achieved by successive stages. The British Government and the Government of India, on whom the responsibility lies for the welfare and advancement of the Indian peoples, must be the judges of the time and measure of each advance, and they must be guided by the co-operation received from those upon whom new opportunities of service will thus be conferred and by the extent to which it is found that confidence can be reposed in their sense of responsibility."

That declaration dominates all further stages in self-rule. The principle of responsible government for India had received the sanction of the British Parliament.

#### **Montagu-Chelmsford Reforms**

The Act of 1919, based on the Montagu-Chelmsford report, introduced a novel experiment into Indian government—dyarchy (i.e. government by two independent authorities). Since the British Government did not believe that Indians were ready for the whole task of governing, it was provided that in the Provinces, now to have elected Indian majorities in the Legislatures, the functions of government should be divided.

Some departments of administration were reserved to the Governors, who might be British or Indian. The portfolios in the Provincial Executives were shared by officials, British or Indian, who could not be displaced by a vote of the Legislatures, and by Indian Ministers, dependent on securing majorities to support them. In the division thus made the officials became responsible for finance—each province having its own budget, distinct from that of the Central Legislature—and for law and order. The "nation building" subjects, such as local government, public health, education, agriculture, and industrial development, were placed in the hands of Indian Ministers.

Such a system, while providing an education in government for the inexperienced,

could not work without friction. Indian Ministers, anxious for rapid progress, had no command over finance. The Minister for law and order could claim such a proportion of the budget as seemed to him essential. Yet although the dual plan worked uneasily and in some Provinces, as in Bengal, with frequent interruptions, during which the Governor had to resume responsibility for all subjects, it gave the Legislatures education in Parliamentary methods and a considerable body of Ministers the opportunity of learning the higher tasks of administration.

The new status and the greater independence that India was achieving was emphasized by other changes. India's representatives had signed the Treaty of Versailles. India became an original member of the League of Nations and of the International Labour Office. Its interests were looked after by the High Commissioner. The offices created were filled by Indians, but it remained a matter of complaint that they were the nominees of the Central Government and to that extent not completely representative of the major political forces of the day.

#### Indian Tariff Reforms

Most significant of the new powers conceded to India was the right, under the Fiscal Convention of 1922, to impose tariffs upon goods entering the country. India secured control of its trade, which it had never had under the Free Trade doctrines of Bright and Cobden prevailing in Great Britain. This new freedom reacted to the great disadvantage of British industry. Cotton, iron and steel were protected and the vast trade in piece goods manufactured in Lancashire, which had fallen away during the First World War, was stayed in any possible recovery by heavy duties. The new steel industry, founded by Tata's, was encouraged to expand behind a tariff wall. Today it is the largest single steel unit in the Empire. India is now numbered among the high tariff countries, and, whatever changes in government the future may bring it has now the complete power to protect its existing and new industries.

Before the ten years of test provided by the 1919 Act had expired the British Government of the day decided to examine the question whether changes in one direction or another were desirable. The outcome was the sending of the Simon Commission to India, and the beginning of a Parliamentary inquiry that, in one form or another, extended over eight years.

#### Successive Conferences

The Commission itself took three years over its labours. Its report was considered, in succeeding years, by three Round Table Conferences in London. In these Conferences representative Indians were associated with members of the two Houses of Parliament.

Finally, the form of the future Bill to be introduced into the House of Commons was considered by a Joint Parliamentary Committee which was presided over by Lord Sankey. The outcome was a measure of three hundred and nineteen clauses.



MOHAMMEDAN LEADER

*The late Mr. A. M. Jinnah, who became the first Governor-General of Pakistan, a separate self-governing Moslem state*



#### INDIAN DURBAR FESTIVAL

*The Maharajah of Patiala at the Durbar celebrating his accession to the throne. He is the head of the Sikh community in India. The photograph gives some idea of the colour and richness of the regal presence in the life of India.*

with ten schedules, introducing changes of far-reaching importance. By this Act, too, Burma, long administered as a Province of India, became a separate country with a government of its own, much on the pattern of that determined upon for India.

As early as October, 1929, Lord Irwin (the present Viscount Halifax), who was then Viceroy of India, was authorized by the British Government to make the statement in India that the interpretation put by the British people on the preamble to the Act of 1919 was that "the natural issue of India's progress, as then contemplated, is the attainment of Dominion Status." The phrase was repeated by Sir Samuel Hoare (now Lord Templewood) when, as Secretary of State for India, he explained the Government of India Bill in the House of Commons in February, 1935. The Bill, it

has to be said, did not specifically mention Dominion Status as the goal. It opened the pathway by which it might be attained. "There was," said Sir Samuel, "no need to enshrine in an Act words and phrases that would add nothing new to the declaration of the preamble."

The most revolutionary change in the forms of government for which provision was made was a Federation of all India, including the Indian States, hitherto outside British India. This had been made possible by a statement from the Princes in the first Round Table Conference that they would contemplate an immediate federation if British India were federalized and the Central Government ceased to be purely official and became responsible to the Central Legislature. These demands were met by the Act, but, unfortunately, this

section never came into operation. In the years of negotiation that preceded the outbreak of war the principal Indian rulers showed reluctance to surrender such a measure of their powers as was essential to the working of a Federation, and British Indian parties were strongly opposed to a representation of the States in the Central Assembly based on the nomination of the princely rulers and not upon popular election. For the time being the Central Government retained its structure with an enlarged Legislature, but with administration centred in an executive responsible, not to the Legislature, but to the Governor-General (or Viceroy), who himself presided over the executive.

That portion of the Act of 1935 providing for the new forms of Provincial Government, and for the separation of Burma under a government of its own, was put into force in 1937. It increased the number of British Indian Provinces from nine to eleven, each with its own Governor. Legislatures were to be elected for each of these Provinces under an extended franchise that swelled the number of electors from fourteen million to thirty-five million. The Provinces were freed from the "superintendence, direction and control" of the Central Government, and, therefore, from that of the Secretary of State. Provincial autonomy was accompanied by responsibility, all departments of administration being controlled by Ministers responsible to their Legislatures and dependent on the confidence of these for their retention of office. No European, official or unofficial, held a portfolio in any of these Ministries. They were completely Indian.

#### Delegating Authority

At the same time there was a considerable transfer of powers from the Central Government to the Provinces. The Viceroy in person remained responsible for foreign policy, for relations with the Indian States and for ecclesiastical affairs. His Government controlled certain all-India services such as communications (railways, posts, telegraphs), currency and tariffs. But ninety per cent of the powers exercised in

normal times by governments and affecting the daily life of the people passed to the control of Indian Legislatures and Indian Ministers, responsible to the elected Assemblies, as are British Cabinets to Parliament. Unfortunately, that full devolution of authority did not prove feasible in times of stress. The transfer of the central machinery for dealing with food shortages to the Provinces added much to the horrors of the Bengal famine of 1942, and a resumption of the control of grain supplies by the central administration was found necessary.

No features of the 1935 Act were more keenly resented by Indian opinion than those which came to be known as the "safeguards" and the clauses that forbade discrimination of any kind against Europeans or European business operating within the confines of India. The "safeguards" were the powers reserved to the Governors in the Provinces, and the Governor-General at the centre, to refuse their assent to Bills passed by the Legislatures, and to "exercise their individual judgment" for 'the prevention of any grave menace to peace or tranquillity' and for the protection of the legitimate interests of minorities.

#### National Congress Powers

Throughout India the Indian National Congress, a political party that claimed the title of national although the main body of its membership was Hindu, had contested the elections and had secured a majority of seats in eight of the eleven Provinces. Its leaders refused to accept office and form Ministries without a guarantee that the reserved powers would not be used. For the time being minority Ministries took office, but after assurances from the Viceroy that, while the Governors must retain the powers given them by the Act, the Ministries would exercise real power and authority, the Congress Party assumed office, at first in six and eventually in eight of the provinces. The reserved powers were in fact little exercised during the years in which Indian Ministries held office, but the wider power, enabling the Governor to take full control where there was inability to



form a Ministry with the support of the local Legislature, was necessarily used in the war years, when Congress Party ministries in all the Provinces in which they had power abandoned office and could not be replaced.

Both the Acts of 1919 and 1935 retained and extended the system of separate registers and a fixed number of representatives for minor communities, thus giving a peculiar fixity to the composition of the



#### STATESMAN AND SPIRITUAL LEADER

*A fighter all his life for the betterment of his people and their political liberty, Gandhi initiated the passive resistance movement*

Legislatures. The Moslems retained their own franchise, and seats were allotted to the Sikhs, who stand outside the general body of Hindus, to the Anglo-Indian community, to the Indian Christians and to the Europeans. The proposal to treat the outcastes or Scheduled Castes, as they are now officially called, as a separate community, with representatives elected by its own members, was stayed by the threat of Mr. Gandhi to "fast unto death" rather than have these classes divorced from the body of Hinduism. A compromise was arranged by which the outcastes obtained double the number of seats originally assigned to them, but their members were elected by the voters on the General Register, which is overwhelmingly that of the caste Hindus. As a consequence members of the Scheduled Castes were in most cases elected on the terms of working in the Legislatures with the general body of Hindus.

#### Ultimate Responsibility

In this brief review of the changes made in the forms of Indian Government in the course of less than a hundred years it is apparent that the stages in advance follow closely the lines of those in the other parts of the Empire. An administration originally wholly European has been first timidly diluted by nominated members of the indigenous peoples, then by elected representatives. Successive steps have added to the strength of the Indian voice in affairs, without surrender of real power, until a stage is reached when partial responsibility is conceded, leading ultimately to parliamentary forms of rule, with full responsibility modified by "safeguards." Partial self-government over British India has been accompanied by the vision of Dominion status, forecasting an equal partnership with Great Britain and with the Dominions of the British Commonwealth. Nor has the process of liberation been slow when compared with the pace of advance elsewhere, although it has been marked by continuing impatience on the part of the Indian people. Between the days when the most Liberal of British parliamentarians were declaring their disbelief in the possibility of parliamentary government for India and the Act

of 1935, no more than a quarter of a century elapsed

Until the transfer of power to Indian Governments in August, 1947, the structure of Indian administration remained nominally the same as when it could be said that rule was British and autocratic. The ultimate responsibility for India rested with the Secretary of State, sitting in a British Cabinet, with the British Parliament and with the British electors. The Viceroy was the representative of the King, and in his capacity as Governor-General could still exercise almost autocratic powers. The administrative machinery, greatly altered in personnel as it had been by the inflow of Indians, retained the same forms.

Practice, as is so often the case, differed widely from constitutional theory. Control by the British Parliament had been, in general, confined to an annual debate on the Indian Budget, to the sanctioning of loans, and to discussions of constitutional changes. Directions from the Secretary of State to the Viceroy had been few or many, according to the relative strength of character of the occupants of office. The Viceroy, in his capacity as Governor-General, might be "required to pay obedience to all such orders he may receive from the Secretary of State," but the practice had been in the main to leave decisions of policy, after due consultation, to the man on the spot. Although "every local Government shall obey the orders of the Governor-General in Council" a wide latitude of independent action had been left to the local governments even before the achievement of provincial autonomy.

#### In the Provinces

It could not well be otherwise. India has the dimensions of a continent and government takes responsibility for a greater variety of public services than in more developed countries. Absolute control from the centre became less and less possible as the dimensions of British India expanded. The provinces, having special interests and problems of their own, assumed a measure of independence in managing their local affairs even before popular institutions had really developed.

Each of the eleven provinces of India had its own Governor, subordinate to the Viceroy, but exercising a large amount of independent power. The Governorships of Bengal, Bombay and Madras were by custom reserved for men appointed direct from the United Kingdom and eminent in public life. The remaining Governors were drawn from the seniors among the Indian Civil Service. Indians were not debarrd from these high offices. The first Indian to be appointed a provincial Governor was the late Lord Sinha.

#### All-India Services

Actual administration in India was and is still carried on through the medium of the Civil Services. The Indian Civil Service, the executive branch—the "steel-frame" as Mr Lloyd George called it—is a *corps-d'elite* drawn from men of university training after special examination. Its members are recruited for service in any part of India, but in general experience remain in one province unless called to the centre, largely owing to the difficulties of language in a country of many tongues.

Another all-India service is the Indian Medical, mainly recruited for the needs of the army, but in its civil branch responsible for hospital administration and public health. The civil department is almost exclusively Indian, fewer than two hundred out of a total of over six thousand being Europeans. Among the security services is the Indian Police (under provincial control, however) of which some account has already been given, and another service recruited directly by the Central Government is that of forestry, with responsibility for the conservation of the state forests, which cover an area of two hundred and fifty thousand square miles.

Outside the all-India services are many others, now mainly provincial and under the control of the elected governments. They deal with education, agriculture, irrigation, botanical survey, geological survey, archaeology, and the survey of all India. The railways, nearly all of which are now state-owned, are controlled by a Railway Board, with a transport member in the Viceroy's Council. The postal staff

### INDIAN MEDICAL SERVICE

*A typical Indian village scene. An Indian officer distributes drugs and medicines, together with instructions for their use to a group of villagers.*

of more than one hundred thousand persons, is under Postmaster-Generals in the provinces, with a Director-General of Posts and Telegraphs as supreme head for all India.

### Problems of Education

Critics of the British administration of India have found its principal failure in the field of education. Today only twelve per cent of the population is literate in any language, and the most literate, as well as the most illiterate, areas are in the States, where education is the concern of the rulers. Yet in 1854, sixteen years before the Education Act came into force in Great Britain, a scheme of education for India had been laid down and adopted. Comparative failure must be ascribed less to indifference than to the poverty of the country, the lack of teachers in a land in which comparatively few women are educated (due to social customs), and the vast wastage in primary education due to the withdrawal of boys from the schools for work in the home and the fields before they have attained the necessary standard.

A secondary cause has been the greater concentration upon higher education of the few rather than general education of the many. India has nineteen universities with an aggregate of one hundred and forty thousand students, of whom some eight thousand are women. In these, the language is English, as it is in the secondary schools. At the lower stages education is in the vernaculars.

For over a quarter of a century education has been the concern of Indian Ministers, who have shown much enthusiasm in approaching their task. The slow progress made in that time is due to the same causes that hampered the earlier British educationists. Compulsory education is still the goal, but except in the larger towns has proved almost impossible of application.

All administration pivots upon the Dis-



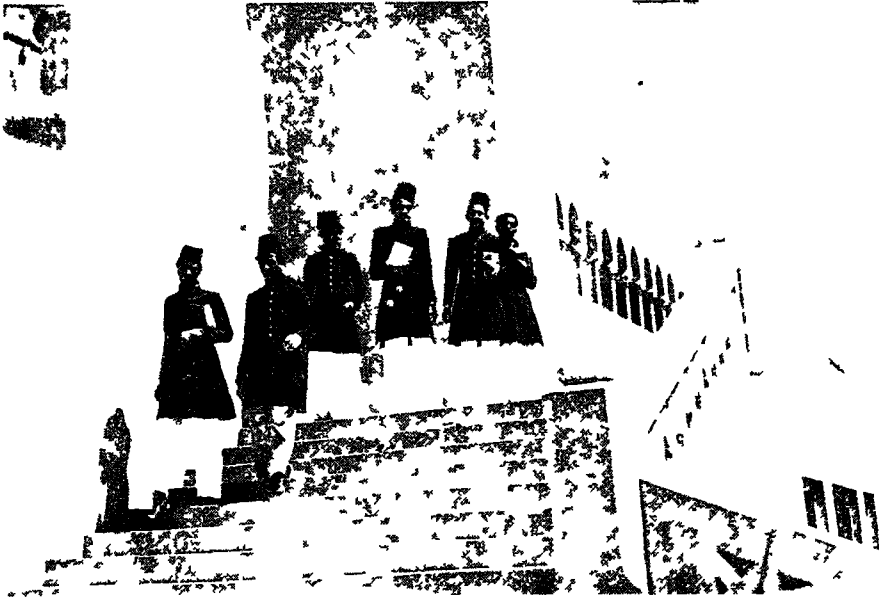
trict Officer, ordinarily a member of the Indian Civil Service, in responsible control of an area of something like a thousand square miles with a population averaging a million people. He is the revenue officer, the chief magistrate, the man to whom the minor services are responsible, and acts as the representative of Government in most matters of concern to the people. Much of



his life in the past was spent in touring his district, carrying his office with him but increasing demands for trained officials at the centres of government have tended to gather into offices the cream of the district officers and to diminish their direct contact with the people

Sir William Marris has written, "The accepted view of the legitimate duties of

government in India is wide compared with that of more advanced countries when British administrators assumed the government it was natural that they should take a wider view of their responsibilities than if they had been dealing with their own people." Comparative widths have narrowed with new conceptions of the functions of government in the West, but it



#### UNIVERSITY STUDENTS

*Students are here seen at the entrance to Osmania University which contains medical, normal, industrial and Sanskrit schools. The university is in Hyderabad, a city which was founded towards the end of the sixteenth century and is capital of the state of the same name.*

remains true that the people of India look to the Government for a wider variety of services than in most other lands.

One reason of this is the slow development of municipal institutions. As early as 1882, Lord Ripon, when Viceroy, endeavoured to give life to municipal and district boards, believing that they would prove a training ground for Indians in the management of public affairs. That hope proved illusory. The lack of money in rural areas and indifference to public interests led to the work of the board being done by the district officer in his capacity of chairman. In the greater towns municipal institutions worked comparatively well, but India is not a country of large cities but of seven hundred thousand villages. The popularly elected corporations of such places as Bombay, Calcutta and Madras do furnish the training ground for larger affairs, but elsewhere a people long accustomed to look to the Government for all public work cannot be said

to have taken advantage of the opportunity offered to them.

Although all power has been transferred to the new Governments, the structure of administration remains with the difference that all appointments are now made by Indian Ministers, and the small British element in the Services is rapidly diminishing by retirement and resignation. It is left to Indians to decide what changes shall be made, but the probability is that the framework of the governmental machine will undergo little alteration.

#### Demand for Self-Rule

The final surrender by the British of all voice in Indian affairs is the response to the growth of the spirit of nationalism in India. From its beginnings as has been made clear, the demand of India for self rule received sympathetic consideration and indeed was stimulated by enlightened Englishmen. The pace of change was hastened by the participation of India in

the two world wars, throughout which the martial races of the sub-continent numbered in millions, gave conspicuous service to the Allied cause. Yet the main impulse has come from the ever-increasing tempo of political agitation. As early as 1884 the Congress Party came into existence. At first a body of constitutional reformers, with representatives of all the communities of India and a few Englishmen in its ranks, it moved steadily towards the left until, under the inspiration and guidance of the great Indian leader, Mahatma Gandhi, it hoisted the banner of complete independence for India. Rejecting as inadequate each fresh advance towards self rule as conceded by the British Parliament, it became a revolutionary body, finally declaring in the words of Mr. Gandhi for "open rebellion" in the early days of the Second World War, in which its members had refused participation.

#### Claims for Pakistan

For a brief time after the coming into force of the Government of India Act of 1935 it seemed that the Congress Party might be won over to purely constitutional reform. Contesting the elections and winning majorities in eight of the eleven Indian Provinces it formed Ministries. For two years these Provincial Governments exercised power and found that the authority conceded to them was real. When India was committed to taking part in the war Congress called out the Ministries, throwing government back into the hands of the Governors. That two years of Congress rule profoundly modified the relations of the two great religious communities of India—the Moslems and the Hindus—and determined the nature of the political settlement that was finally reached. In a formidable indictment the Moslems asserted that they had been subjected to unfair discrimination and oppression. Having experienced what Hindu government might entail—the domination of the major community—they claimed that India must be divided and Moslem government established in all areas in which the Mohammedans formed a majority of the population. Their

demand for "Pakistan" offset the Congress claim that as a party it spoke for all India.

This quarrel between the Moslem and Hindu communities was for long to frustrate every effort to associate the main Indian parties with, and in the government of the country. Early in the war Lord Linlithgow, the then Viceroy, offered seats in an expanded Executive Council to the leaders of the warring parties. There was refusal to co-operate. Sir Stafford Cripps went to India taking the British Government declaration that with the end of the war Indians might meet in a Constituent Assembly and frame their own constitution with the right, if they chose, to secede from the British Empire. Mr. Gandhi described the offer as a "post-dated cheque on a crashing bank"—the Japanese were overrunning Burma and approaching the borders of India. The offer was rejected, accompanied again by the claim that a National Government should be set up at once, and the complete independence of India proclaimed.

#### Negotiation Deadlock

Subsequent negotiations attempted by Lord Wavell, the Viceroy after the release of the principal Congress leaders, proved no more successful. The Congress Party, now more willing to come to terms about the composition of a new Central Government, found Mr. Jinnah, militant leader of the Moslem League, adamant in his demand in which he had never weakened, that a first requisite of any negotiations should be the concession of Pakistan, or the division of India into Moslem and Hindu districts with a view to ensuring self-government for Moslems. In the deadlock that ensued the British Government decided that new elections should be held and that afterwards Indians should decide for themselves the form of constitution that they desired.

When elections were held they served only to confirm the claims of the Congress Party and the Moslem League to speak for the two communities, and while the former insisted on an undivided India, the Mohammedans were more resolute than

## A MOMENTOUS MEETING

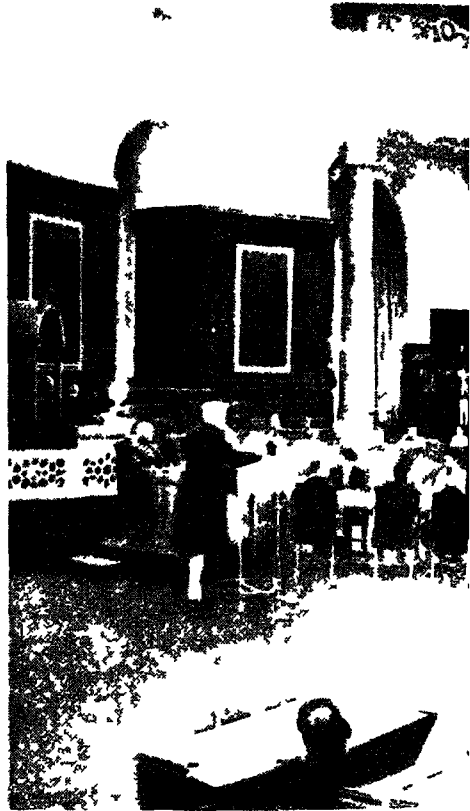
*Pandit Nehru moves the historic resolution for an independent sovereign state at a meeting of the Indian Constituent Assembly in New Delhi in 1947*

before for separation. The deadlock continued. With the end of the war and the return to power of the Socialists in Great Britain a Cabinet Mission, consisting of Sir Stafford Cripps, Lord Pethick Lawrence and Mr. A. V. Alexander, went to India "with the intention," in the words of Mr. Attlee, "of using their utmost endeavours to help her to attain her freedom as speedily and fully as possible." Although the Mission, in its report, deprecated a "sovereign state of Pakistan," it left the door open to such a solution of difficulties. Their detailed plans for a Constituent Assembly never proved feasible, since, when the Assembly was chosen, the representatives of the Moslem League declined to take their seats. In their absence the Assembly, under the leadership of Pandit Jawaharlal Nehru, declared that the future form of Government should be that of a "sovereign independent republic."

## Independence

In the meantime the control of India had, for practical purposes, been transferred. First Lord Wavell formed a Cabinet in which the Moslem League declined seats. Subsequently the Cabinet was reconstituted with Moslem members, but with gradually growing antagonism between its sections. In February, 1947, the British Government announced that all power in British India would be given into Indian hands not later than June, 1948. Paramountcy over the Indian States would cease, without being transferred to an Indian Government. The States were left to their own decision as to their future allegiance. The obvious expectation that urgency would compel some kind of agreement between the warring parties was disappointed, rather the gulf was widened.

Lord Wavell resigned his position as Viceroy and Viscount Mountbatten succeeded him. Within a few months the



new Governor-General was persuaded that partition was inescapable and had submitted a detailed plan for the division of India, which was accepted by the Cabinet and embodied in what, in July, became the Indian Independence Bill. The principle of two Indias—the one India, the other 'Pakistan'—was accepted, but with the provision that the Provinces of the Punjab and of Bengal, the whole of which had been claimed by the Moslems, should themselves be divided on a basis of majority populations in the separated areas. There would be two Constituent Assemblies to draft constitutions for what would become two new Dominions of the British Commonwealth, and the transfer of power would be brought forward to August 15, 1947. On that day the King would surrender the title of Emperor of



India, the British people would end all responsibility for Indian government, and the British Army, so long a part of the defences of India, would be withdrawn.

With the concurrence of all parties the Bill was quickly passed through both Houses of Parliament and received the Royal Assent. While accepted by the major parties in India, though not by the Sikhs, it gave satisfaction to none. The Hindus had to abandon their claim to an undivided India, while the Moslem conception of Pakistan was narrowed by the loss, after plebiscites had been held, of West Bengal and the East Punjab, together with all Assam, with the exception of the Sylhet district. To Pakistan were assigned East Bengal, the West Punjab, and the Provinces of Sind, the North-West Frontier, and Baluchistan. The remainder of British

India became "India," with its capital at Delhi and Lord Mountbatten as its first Governor-General, while Pakistan selected Mr Jinnah as Governor-General and established a new capital in Karachi.

#### Framing Constitutions

From the constitutional point of view it is to be noted that the surrender of government by the British was carried through in novel circumstances. Neither of the two new countries carved out of the body of India had settled the terms of its future constitution. Each was to provide itself with a Constituent Assembly which, for the time being, became also the Legislature. Consequently provision had to be made that government in the two separate areas should be carried on "as nearly as may be in accordance with the Government of



India Act, 1935' but with the proviso that "His Majesty's Government have no responsibility as respects the government of any of the territories which were included in British India"

For practical purposes, therefore, the two Indias were governed under the existing law during the interregnum before constitutions could be drawn up. The administrative machinery remained the same as it had been under British rule, though the Services were divided between Pakistan and India. The judicial courts remained in being. The Indian Army, shorn of its British regiments, was divided between the two Governments. Plainly the anomalous situation of vast and complex countries working without constitutions and with legislatures elected for a purpose other than the making of laws cannot survive for long.

#### Future Pattern of Government

While the probability is that the constitutional structure will be modified, and not necessarily in the same manner by the rival Governments, the likelihood is that the pattern imposed upon administration through the years of British rule will remain. The Services have been adapted to the peculiar needs of India, and both Governments have shown anxiety to retain them in their present form and with as much British assistance as can be enlisted. The Law Courts, from which the smaller number of British judges now remaining will gradually retire, will continue to apply the pattern of law as built up under British guidance. The police forces, no longer partially alien, will carry on the traditions of the past. Much of the framework that assured India order in its internal affairs and the exercise of impartial justice will be as necessary in the future as in the past. Just as law in India has been superimposed upon the Moslem and Hindu law of the past, and has incorporated many of its peculiarities, so the influence of western ideas of justice and practice will remain potent.

General expectation that the vast majority of the Indian States, freed from any control of their external affairs by the

ending of paramountcy, would associate themselves with one or other of the new Dominions, has been fulfilled. Under the new regime, nevertheless, most of them will remain comparatively independent in internal matters. While the larger and more advanced States already had legislatures and High Courts following closely the pattern of those of British India, others have hastened to bring themselves into line. It is probable, nevertheless, that a great body of local law, deriving either from Mahommedan or Hindu tradition, will survive in the administration of the States. No single pattern or code is immediately possible amid peoples of such diverse origins and customs.

#### Commerce and Industry

Already in the period of transition additions are being made to the Statute Book of legislation regulating commercial and industrial transactions, although the tendency in India, as elsewhere, is to control such matters by Governmental order rather than by statute law. Both the new Dominions aim at a great expansion of industrial and agricultural activity, directed by Government and restricted by law. With the transition to Indian rule, it should be noted, the safeguards for British commerce contained in the Act of 1935 have been swept away, and the Indian conception of the industry of the future is of large-scale nationalization accompanied by a considerable body of new laws for the protection of labour.

The abandonment of British rule and the division of the country was not effected without disturbance. Hasty and panic-stricken migration of the peoples of two faiths in the Punjab, east to west and in the reverse direction, led to a temporary collapse of law and order in that province and to widespread rioting and slaughter. In Kashmir, the future allegiance of which was undecided, an incursion of the tribes from over the border created a situation that at one time threatened to develop into civil war between the two Dominions. The culmination of these disturbances was seen in the assassination of Mr. Gandhi, who had undertaken two fasts in the endeavour

to promote reconciliation between the Hindus and Moslems. In the hour of India's freedom the man who had played the outstanding part in the demand for complete independence was sacrificed to fanaticism.

Britain has reached the end of the greatest experiment ever made in the rule of an alien people. "We can assert," said

the Prime Minister in speaking on the Indian Independence Bill, "that our rule in India will stand comparison with that of any other nation which has been charged with the ruling of a people so different from ourselves."

What may longest survive from that rule is the pattern of law and the forms of administration that the West gave the East

### *Test Yourself*

1. Mention some of the chief causes which have prevented the various peoples who have settled in India throughout the centuries from being merged into a united community
2. What are the main characteristics of the caste system?
3. What great change in Indian government occurred after the Indian Mutiny of 1857?
4. What is "dyarchy"?
5. Since when has India controlled its own tariff policy, and what has been the effect on Britain of this Indian control?
6. What were the Indian "States"?
7. What is the "Indian National Congress"?
8. What was the main demand of the Moslem League?

*Answers will be found at the end of the book.*



ABRAHAM LINCOLN

*Abraham Lincoln was the man who preferred to fight a civil war rather than see his country permanently divided. Throughout his political life he displayed sincerity, honesty, steadfastness of purpose and very great qualities of leadership.*

# LAW AND GOVERNMENT IN THE UNITED STATES

ALTHOUGH the United States is still thought of as a "young" nation, its Constitution is the oldest surviving written constitution of the western world. A hundred and sixty years may not be long in the life of a nation but, as constitutions go, it is venerability indeed. In those hundred and sixty years there have, of course, been some changes in the document which was drawn up in Philadelphia in 1787, but they are small in proportion to the whole not only the broad outlines, but also most of the details, of the original plan survive today. This has endowed the American Constitution with something of that monumental symbolism which in Britain attaches to the Crown. The American Constitution, in its time-defying immutability, symbolizes the permanence of the American State.

## Importance of the Constitution

What is more, it is the American State. In other countries, in France for example, constitutions may come and go, First, Second and Third Empires and Republics, and yet throughout all the constitutional changes France somehow survives unchanged in its essential characteristics, in those qualities which make it, recognizably, French. Not so in the United States. It took a constitution to bring the United States into being at all, to weld thirteen disparate, rebellious colonies into a unity, and it was a constitution, championed in the courts and the legislatures, carried, like the Ark of the Covenant, into the newly settled lands of the West, and fought for in a bitter Civil War, that kept the United States united while it expanded to a hundred and forty millions of people and over a whole continent of territory. The Constitution is the very warp and woof of American history, it is the link between the *Mayflower* descendant and

yesterday's immigrant, the cement of a nation which is, as Walt Whitman said, "a nation of nations."

Yet, for all its permanence and persisting importance, the American Constitution bears, no less than other human creations, the marks of place and time. It is a product of eighteenth-century political thought adjusted in the first instance to the exigencies of some four million people strung along the shores of the Atlantic seaboard of North America.

Some of its eighteenth-century assumptions seem as self-evident today as in 1787 that government is power, but that the abuse of power is tyranny, that men are endowed with certain rights which it is the business of the State to respect and preserve, that laws shall not be vengeful in their adoption or capricious in their application.

Others seem, at any rate to a British observer, to be somewhat less than eternal verities. It was, for example, a conviction of the "Founding Fathers, inherited from Locke, Montesquieu and Blackstone, that to guard against a government turning into a tyranny it was necessary to separate its powers and establish "checks and balances" against the encroachment of each on each. Thus the executive, in the person of the President, was to be separate from the legislature in the two houses of Congress, while the judiciary, in their courts, were to be kept separate from both. At the same time each branch of government was given a certain hold over the others. Thus the President could veto the acts of Congress or Congress might reject the proposed appointments of the President. The wisdom of these provisions is not lightly to be questioned when they have survived the political vicissitudes of more than a century and a half, but it is at least true to say that they no longer bear the axiomatic force



#### DECLARATION OF INDEPENDENCE

*Signatories to the Declaration of Independence of July 4, 1776, are seen in this contemporary print. By this declaration drawn up by Thomas Jefferson, the thirteen British colonies in America broke their allegiance to Great Britain.*

which they had when they were first proposed.

The greatest problem, however, which confronted the architects of the Constitution was not so much the organization of the central government, as the working out of the relations between the central government and the thirteen states which were about to be its components. For the purpose of fighting the Revolutionary War the states had formed a loose confederation which was no more than a 'league of friendship' in which the authority at the centre was so weak that it exercised virtually none of the powers of government at all. Once the unifying influence of war with a common enemy—England—had ended, the whole structure looked like disintegrating. It was the genius of the delegates to the Constitutional Convention of 1787 that they devised in its place a form of central government strong enough to maintain unity and yet sufficiently circumscribed to leave the state governments safe in

the enjoyment of a wide range of powers.<sup>1</sup>

This took the form of a federal union—in effect a permanent treaty by which the powers of government were divided between the national government at the centre and the states at the periphery, on the broad principle 'that the national government should handle those affairs which are of common concern to the citizens of all the states, while the state governments should be responsible for the rest. This distribution of powers, to be acceptable, had to be clearly defined and protected against arbitrary change. Hence a *written* Constitution, in which the powers as well as the structure of the central government are clearly set out: hence also a *rigid* Constitution which can be changed in any particular only if an overwhelming majority of component states and citizens demand it.

It was impossible to establish an all-

<sup>1</sup> It is true that the settlement of 1787 proved unacceptable to the Southern States which tried secession in 1861 but political and economic divergence between them had already gone too far. The United States have remained a free society having passed at certain points reconciliation under any form of government was difficult.

powerful central government, as in Britain, which some of the delegates in 1787 would have secretly preferred, because the states would not tolerate such a surrender of their sovereignty. But even if they had it is inconceivable that an area as vast and diversified as the United States of the eighteenth century could have been effectively and democratically administered from one exclusive seat of government. The twentieth century, with all its improvements in communication, has not substantially altered that. Indeed, a United States of a hundred and forty million people, of all races, religions and cultures spread over an area of more than three million square miles, embracing every variety of climate and every form of economy, is in some respects even less capable of being "run from Washington" than was the modest republic of a hundred and sixty years ago.

#### American Central Government

Nevertheless, the "Founding Fathers" undoubtedly intended and contrived to set up a government at the centre which would be strong and flexible. What powers does it wield today? It administers foreign affairs, of course, and all that appertains thereto—armies, navies and the whole economic strength of the United States in its collective aspect, foreign trade and foreign commercial relations. Equally it administers all *internal* affairs which transcend the boundaries or exceed the capacity of individual states—from post offices to flood control. With the increasing interdependence of modern economic life this area of "interstate" activities, for which the federal government has responsibility, has enormously widened. Plagues, stock-jobbing, unemployment, soil erosion are random samples of phenomena which refuse to recognize the boundaries of state lines and which increasingly demand the attention of a government which can act for the whole United States.

None of them, it is true, will be found listed in so many words in the Constitution, but the breadth of some of its phrasing, assisted by the ingenuity of some of its interpreters, has made the document in this respect remarkably adaptable to the

changing needs of American society. For example, over and above its specific powers, Congress is entitled to provide for "the general welfare" of the United States—a wide term which may justify many governmental activities. Moreover, in addition to its enumerated powers, Congress can also "make all laws which shall be necessary and proper" for their execution. The increasing complexity of government has led Congress far in the exercise of these "implied powers," so that federal legislation over matters as widely varied as banking activities and the white slave traffic has been held to be constitutional under this clause.

#### Powers of the States

What then is left to the states? The Constitution here says merely that the states may exercise whatever powers are not forbidden as such (e.g. suspension of civil rights) or are not expressly delegated to the federal government. There is no catalogue: the states are left an uncharted domain in which each, within limits, may do as it pleases.

Generally speaking, however, state governments are responsible for the enactment and administration of most of the criminal and much of the civil law. All commercial, industrial and agricultural activities which are carried on within their borders are matters for their regulation and control in all their *intra*-state aspects. Since a state may include millions of inhabitants and cover an area as large as a European country, this means that it has real and wide powers in the fields of labour and factory legislation, company incorporation, public health, pensions, workmen's compensation, unemployment insurance. Some of these powers may be paralleled or supplemented by powers of the federal government, operating *within* the area of a state but on *inter*-state activities, but for many of them the state government is the exclusive authority. And there are certain fields into which the central government enters not at all—such as education, marriage and divorce, and (except during the operation of the Prohibition Amendment) liquor control. The state government is in no sense to be equated with a

British county or borough council not only does it enjoy its powers in its own right and not as a delegation from above, but also the powers it enjoys are wide, varied and enforceable by its own machinery of order and justice. It is thus no exaggeration but a sober fact that states are sovereign and command the allegiance of their citizens.

But the federal government is also sovereign, and it, too, commands the allegiance of citizens of the United States. How are the boundaries of these sovereignties and these allegiances to be kept precisely defined? They were set out, it is true, originally in the Constitution but are for ever influenced by the moving tide of history. And how are conflicts of loyalties and jurisdictions to be resolved? The American's answer, for practical purposes, is "by the courts." He would accept the frank admission of a Chief Justice of the Supreme Court: 'We are under the Constitution, but the Constitution is what the judges say it is.'

To an English eye, at first sight, nothing is so surprising as this practice of allowing the courts to determine issues which are often, in content as apart from form, much less judicial than political. But although decisions by the courts have often precipitated political controversies of tempestuous vehemence, their right to pass judgment on constitutional issues has not been seriously challenged.

In the first place it is hard, perhaps, to conceive of any other branch of the government to which the task could be entrusted. If the controversy were between state and state the federal Congress might conceivably act as arbiter, but far more frequently it is a conflict of jurisdiction between the federal and the state governments which has to be resolved, in such a case the courts are the only branch of government which is not itself an interested party. And in a great many cases the issue is not one between national and state governments at all, but concerns the question of whether Congress or the President is overstepping the various bounds which the Constitution imposes on all law-making and executive action—e.g.

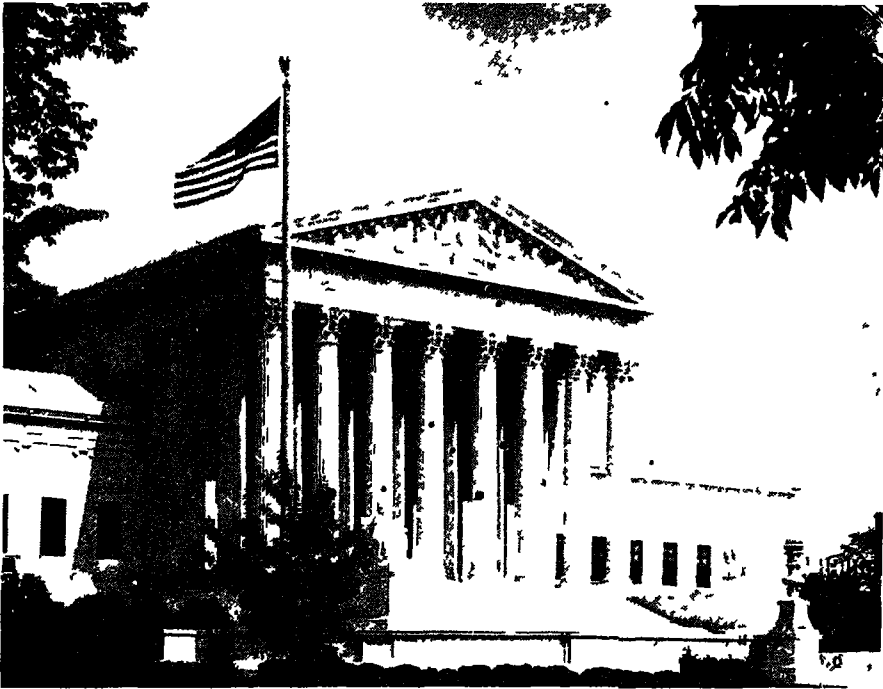
when it forbids laws "impairing the validity of contracts," or forbids the deprivation of "life, liberty or property without due process of law." For the eighteenth century, in its distrust of omnipotent government, was determined not to let Congress, even within its own federal sphere, emulate the free sovereignty of the British Parliament, and in the twentieth century it is, in the last resort, the courts who administer these constitutional restraints on governmental usurpation.

The weapon the courts employ in their constitutional policing is known as judicial review. If a citizen considers that a law or act of a state or federal government contravenes the Constitution, he can bring a case into the courts and the judges must decide whether his claim is valid or not. An important case is likely to be carried by appeal up the judicial ladder of state or federal courts until it reaches the top rung, the Supreme Court of the United States. Their decision on a majority vote—it may only be five to four—is final, and, if they pronounce the law or act in question to be unconstitutional, it immediately loses all legal effect.

#### Supreme Court Powers

Under this power important Acts of Congress have been set aside, moneys levied have been restored, individuals wrongfully imprisoned have been released. Moreover, since each decision becomes a pointer for the next, the document which the courts are interpreting, the seven-thousand-word Constitution, has been supplemented and overlaid by some hundred and seventy volumes of interpretative decisions. There has thus been built up a corpus of juristic-constitutional learning which in the subtlety of its reasoning recalls nothing so much as the theological disputations of the medieval schoolmen yet whose subject matter is almost always the very stuff of contemporary politics, with implications for the prosperity and happiness of millions.

The Supreme Court judge, in consequence, needs to possess a remarkable combination of legal erudition, political sensibility and the appearance, as well as



#### SUPREME COURT BUILDINGS

*The imposing buildings of the Supreme Court are to be found in Washington. Above the Corinthian pillars at the entrance is the carved inscription, "Equal Justice Under Law." In constitutional disputes the Supreme Court judges are the final authority.*

the reality, of personal incorruptibility. It is the middle term which has been most often lacking for a considerable period in its history. The Supreme Court misconceived its function to be the application of *laissez-faire* economic principles to every constitutional problem, seeking to effect, as Justice Holmes complained, the "enactment of Mr. Herbert Spencer's *Social Statics*." But the deserved reputation of its Justices for learning and probity has earned them a unique respect, and their discretion and moderation have generally enabled the Court to maximize its political power without flouting the democracy it exists to serve.

A federal constitution is, of necessity, a compromise, and the Congress of the United States still reflects, in its organization, the first great compromise of the

Constitutional Convention. It was the conviction of the small states in 1787 that, unless safeguards were provided, the large states would overwhelm them in the federal legislature by weight of population, and of the large states, no less, that their small neighbours would combine to out-vote them. Accordingly two chambers were established: the lower, the House of Representatives, election would be on a population basis, while in the upper house, the Senate, each state, irrespective of its size, would be entitled to two members. There are now four hundred and thirty-five Representatives (on present population approximately one to every three hundred thousand inhabitants) and ninety-six Senators. Originally the Senators were elected by the state legislatures, but since a Constitutional Amendment in 1912





THE CAPITOL, WASHINGTON

*Seat of the Government of the United States of America, the Capitol at Washington dates from the end of the eighteenth century and was badly damaged by British troops during the war of 1812. The Senate Chamber and the House of Representatives are reached from the main buildings by subways. At one time the Supreme Court was housed here*

they, like the Representatives, have been elected directly by popular suffrage. But while Representatives sit only for two years, Senators last for six, one-third of the Senate coming up for election every two years.

Unlike the Commons and the Lords, the House of Representatives and the Senate are constitutionally equal bodies, neither of which can coerce the other. The House of Representatives has the traditional Anglo-Saxon prerogative of a lower chamber of being the originator of all money bills. As against that the Senate can boast its control over treaties (which require a two-thirds majority for their ratification) and over Presidential appointments (which require its approval). Both chambers have to agree on legislation before it can go forward for the President's

endorsement, upon which it becomes law. Any differences that may arise between the chambers on the form that the proposed laws shall take have to be smoothed out in the discussions of committees appointed for the purpose from the membership of both chambers.

In fact, as opposed to constitutional theory, the Senate is the more powerful chamber. Its corporate consciousness is highly developed, as befits a body which never dies and is never exposed *en bloc* to the blasts of popular will. True, the Senate is an anarchic body, which refuses to discipline itself, and makes its procedure as it goes along. "Rules are never observed in this body," observed a President of the Senate, "they are only made to be broken." Thus there is virtually no limitation on debate, and in place of majority dominance

there is great latitude for minority expression. This is possible because the Senate is small, almost a club, in which party lines are loosely drawn and party discipline cannot be rigidly enforced. But at any threat to the privileges or authority of the Senate ranks are immediately closed, and Senator stands shoulder to shoulder with Senator, reminding the world that he is the spokesman of a sovereign state, an elected representative whose term is half as long again as the President's, and a member of what has been called the most powerful second chamber in the world.

#### **Powers of Representatives**

By comparison the House of Representatives seems to lack stature and presence. Its debates are seldom remarkable for eloquence or relevance and they are seldom reported in the national Press. What a Representative says is not news, except to his own constituents. Moreover, by comparison with the six-year Senator, the Representative seems but the creature of a day. Scarcely will the freshman Congressman have learnt the Washington ropes before his two year term of service will be up and he has to start the fight for re-election.

But this is not to say that the House is a body of no account. Not only does it include many notable figures amongst its members, it may also claim to be the only chamber which collectively reflects the popular will. The Senate never goes down entire into the waters of electoral rejuvenation, whereas the House gets its mandate renewed every other year.

But its mandate is very often a local, not a national one. That is to say, the Representative's election is more likely to depend upon his attitude to local needs and local politics than, for example, his counterpart in the British House of Commons. This is partly due to the size and diversity of the country, partly to the frequency of the elections, and also in very large part to the workings of the 'locality rule'—a convention which requires that a Representative must reside, not merely in the state, but within the actual district which he represents. Thus, if defeated, he

cannot, like a British M.P., seek his fortunes elsewhere, his only hope of a continuing political career residing in his success in wooing back the affections of his fellow-residents. His national zeal must consequently never soar beyond the limits of local approval and comprehension. He can aspire to be a prophet—but only if he is careful to get honour in his own country as well.

Inside the House a Congressman works hard. If debates give the contrary impression, that is merely because, both in House and Senate, the bulk of the work is done in committees.

Left to itself, no parliamentary body functioning as an entity can initiate and direct legislation. For both the House of Commons and the Lords the Cabinet, which is, in reality, a committee of Parliament, effectively determines which bills shall be considered and in what order. But the division of powers in American government makes it impossible for the American executive so to direct the legislature, neither the President nor his department heads can be members of Congress. Consequently Congress has devised its own machinery of committees for arranging its legislative programme.

#### **Work of the Committees**

Each chamber has a number of standing committees divided according to the subject matter of government, and it is to the appropriate committee that each piece of proposed legislation is referred before any discussion in the chamber. This is in significant contrast to the procedure in the British Parliament, where bills are first considered by the House as a whole and only then, when approved in principle, referred to committee.

The British procedure keeps decisions of principle in the hands of the whole House, and the committee is expected to confine itself to amendments of details. In Congress, on the other hand, the committees take initial decisions on both principle and detail. This proceeds in part from the sheer volume of legislative proposals with which Congress has to cope. With no Front Bench to dominate it and

steal private members' time, members of Congress can introduce as many bills as they like. This gives free rein to that universal sentiment, there ought to be a law," and results, in the two-year life of a Congress, in the introduction of some ten to eleven thousand bills. Obviously Congress as a whole has not the time to pass individually on all these legislative infants. It therefore at once hands them over to the appropriate committee which by methods ranging from euthanasia to violent strangulation, disposes of the great majority without ever troubling the parent body again. Since many of them will have been frivolously conceived to satisfy a Congressman's constituents, or his own *amour propre*, and since a great many of the rest will duplicate each other, the loss is little lamented. Casualties are heavy; in the seventy-sixth Congress (1939-1941) out of 11,358 bills introduced, 8,245 were never reported out of committee. The remaining 3,113 survived their committee ordeal, but almost all suffered a greater or lesser degree of committee amendment.

This process is often a slow one. First of all there are committee hearings (at which cabinet ministers and the interested public may give evidence). Then, when these are concluded, the committee goes into "executive" (secret) session and hammers out the precise form of the bill. Finally, if by a majority vote it approves of the bill, it will report it to the chamber as a whole.

#### Importance of Committees

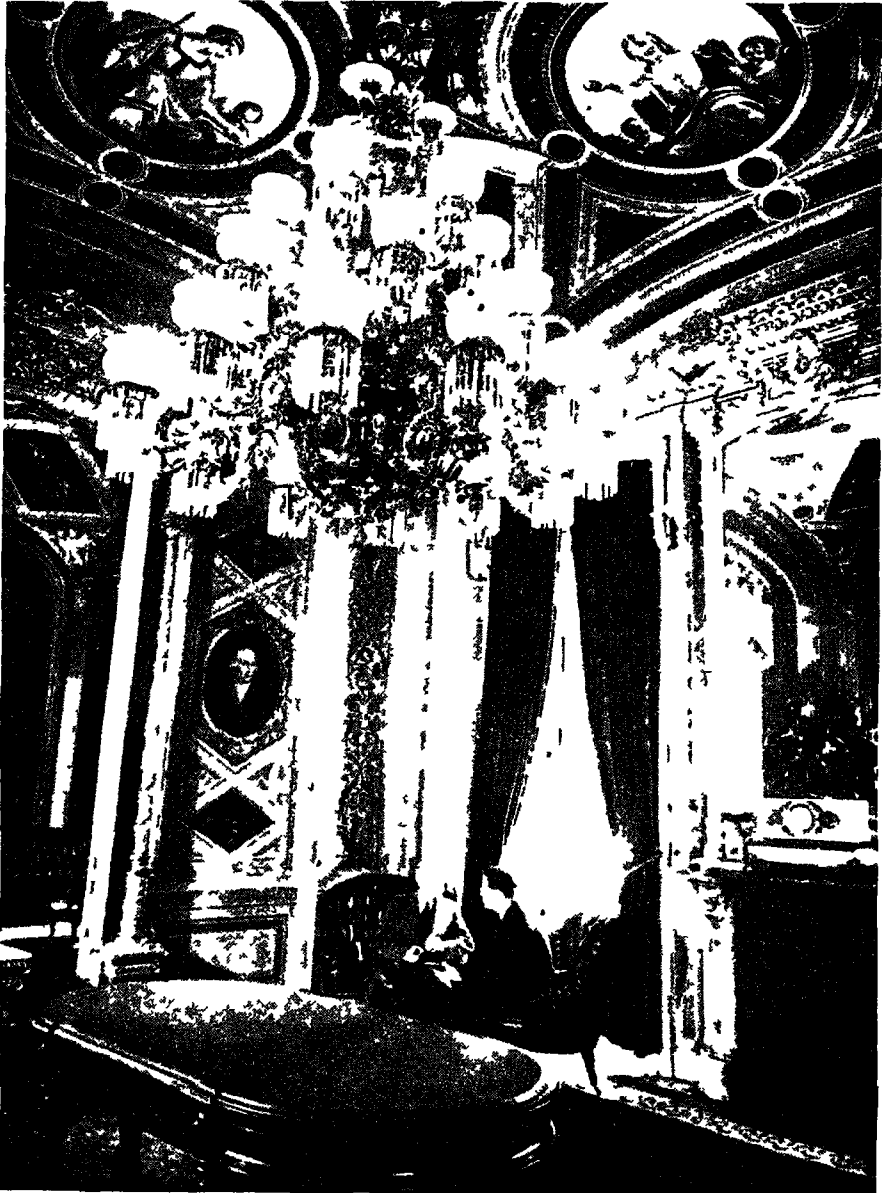
In the House the Committee on Rules or the informal "steering committee" of the majority party will determine which standing committee recommendations will be taken up, and in what order. The Senate has a more automatic system, by which bills are usually taken up pretty much in the order in which they are reported from committee, but the freedom of debate which then ensues makes the post-committee stage in the Senate far more important and perilous than in the House. Thus, with the exception of the Committee on Foreign Relations, Senate committees do not, as a rule, develop the power, the

*imperium in imperio*, which characterizes the committees of the House. Chairmanship of all committees goes by seniority, i.e. length of continuous congressional membership. Consequently it is the oldest members, with the safest seats, who tend to control committees. When Democrats are in power this generally means conservatives from the South, when Republicans are in the majority their chairmen are generally drawn from the conservatives of New England or the Middle West.

The committee system is responsible for the frequently slow progress of legislation, for a diffusion of responsibility within each chamber, and for a semi-permanent tilting of the legislative process towards conservatism. On all these grounds it has been attacked, and room for improvement undoubtedly exists. But where the executive and legislature are permanently separated from each other some such system is essential.

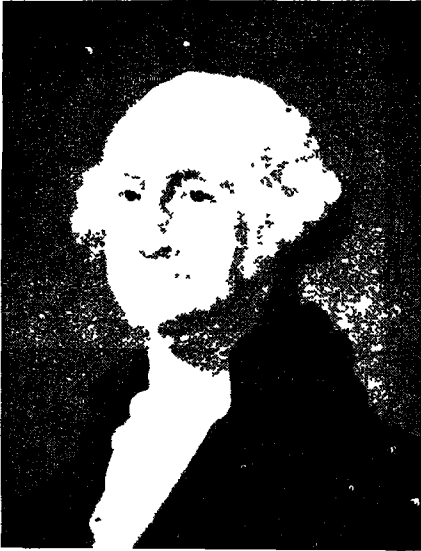
Only by means of the committees can Congress organize itself and keep an effective check on the executive. Without a "question time" analogous to the House of Commons, and without the power of displacing an executive which it does not like, Congress would be ignorant and impotent if it were not for its committees. Sufficiently small and continuous to probe into detail and to build up their own specialized knowledge, the committees hold hearings at which executive departments can give evidence and to which they must supply information. Special investigating committees, with powers of summoning witnesses *subpoena*, can examine abuses and correct maladministration. Inevitably their operation lags behind the executive they endeavour to control, but even parliaments with other devices do not always escape this misfortune. Inevitably, also, they reflect the weakness of the larger chambers to which they belong in an over-sensitiveness to group and local pressures. But for this last the Constitution has endeavoured to provide an extra-congressional corrective. It is the office of the Presidency.

A President of the United States combines a number of different roles. He is, in the first place, the Chief of State, who



#### PRESIDENT'S ROOM IN THE CAPITOL

*The official residence of the President of the United States is the White House but the Capitol also contains a private room for the President, who combines the tasks of king and prime minister. The style of this room, seen above, is richly decorative. A portrait of George Washington, the first president, can be seen on the wall.*



GEORGE WASHINGTON

*Washington was commander of the American Army that established the independence of the British colonies, and first president of those independent states*

symbolizes in his person, as the Stars and Stripes symbolize it in a flag, the authority and unity of the United States. The ceremonial duties and the prerogatives which in the United Kingdom attach to the King, in the United States attach to the President. Though he is entitled to no more magnificent mode of address than "Mr. President," he is the First Gentleman of the Republic, as his wife is the First Lady. His residence, the chaste and elegant White House, whose cellars still bear the marks of their burning by British troops in the War of 1812, is in most respects the Washington counterpart of Buckingham Palace, of which it is, incidentally, an architectural contemporary.

But the White House also enshrines a set of historical associations such as in England cluster around the far more modest frontage of No. 10 Downing Street. For not only is the occupant of the White House a tenant with a limited lease, but he also adds to his ceremonial functions as head of the state the burdens of

executive office such as in Britain fall to the Prime Minister. He is king and premier in one. "The executive power," says the Constitution, "shall be vested in a President of the United States of America." And, sprouting as it were from the side of this executive capacity, are his powers and duties as Commander-in-Chief of the Army and Navy, and as "sole organ of the nation in its external relations." He thus combines what Bagehot calls the "dignified" and the "efficient" functions of government, and has in his hands the potentiality of as much prestige and power as any other constitutional ruler in the world.

He may choose, of course, not to draw on this potentiality. "His office," said Woodrow Wilson, "is anything he has the sagacity and force to make it." Wilson certainly made everything he could out of his office. But Presidents less exercised by the compulsion of their times have been content, like Coolidge, with a negative interpretation of their office, satisfying themselves with seeing that "the laws be



FRANKLIN ROOSEVELT

*Four times elected President, Franklin D. Roosevelt greatly extended his country's participation in world affairs*

faithfully executed," and leaving political leadership to those in Congress or elsewhere who might aspire to it. This is possible under the presidential system, because the separation of powers protects the President from the sporadic criticism which comes to the British Prime Minister from the House of Commons of which he is a member.

Try as he will to minimize the responsibilities of his office, and disport himself in it, like Lord Melbourne, with the graceful lethargy of a country gentleman, the British Prime Minister cannot escape the impact of every political breeze that blows. The House of Commons is a cave of the winds, and if the Prime Minister cannot calm or rule the tempest it is certain to blow him off his perch. The American President, by contrast, can shelter behind the draught screen provided by the Constitution, irremovable during his four-year term of office, he can defer to Congress or not, as he pleases, show energy or not, as he feels inclined, be positive or negative in policy as his conception of government dictates. So much at least is his constitutional right, but it is only fair to add that the President, as a democratic official and a politician, is by both nature and training likely to be highly sensitive to the pressure of public opinion, and that public opinion, in the U.S.A. as elsewhere, is increasingly looking to its government for positive action.

#### Scope of President's Powers

How great the President's power can be when he chooses to extend it to the full has been well illustrated in recent times. President Roosevelt, in the face of a national economic collapse in 1933, obtained from Congress authority to reorganize the executive departments, reduce official salaries, draw up codes "regulating conditions of work in thousands of industries, regulate the currency, control agriculture and provide unemployment relief and public works for millions. They were itemized and limited powers but their sum total was prodigious. The executive in every country has, of course, a residue of "emergency power" to be used in time of crisis when normal legislative or judicial processes are not possible. In America this

belongs to the President and has been strikingly used—e.g. by Abraham Lincoln who, as Commander-in-Chief in time of civil war, imposed a blockade, raised an army, emancipated slaves and suspended *habeas corpus*—all in advance of congressional authorization.

#### Cabinet and Civil Service

But in normal times the President, like any other constitutional executive, has only the powers which Congress and the Constitution give him. These powers, however, to a much higher degree than those enjoyed by the British executive, are centralized in the personal office of the President. His Cabinet, for example, is not, like the British, a council of equals and fellow-politicians. It is a group of department heads, responsible to the President and removable by him. They meet as often—or as seldom—as he pleases, and their advice can be equally demanded and ignored. "Noes seven Ayes one, the Ayes have it," said Lincoln, after taking the opinion of a Cabinet which was in total dissent from his own. In a great many cases the President may in fact rely on unofficial advisers—"the Kitchen Cabinet" of Andrew Jackson, or "the Brains Trust" of Franklin Roosevelt. If he does, the Cabinet have no grounds of complaint, they are the President's servants and must take his orders or resign.

That is not to say that a Cabinet member may not, like Mr. Cordell Hull as Secretary of State, be an influential figure in the making of policy, but merely that any such influence is a function of his personal prestige and ability, not of his membership of the Cabinet. When Mr. Ickes resigned as Secretary of the Interior the action was damaging to President Truman merely because of Mr. Ickes's gift for invective and reputation for integrity and not because anyone disputed the President's right to replace a Secretary of the Interior with whom he disagreed. A President, if he is wise, will keep Cabinet disagreements to a minimum, and he will staff his Cabinet with persons who best combine administrative ability, personal loyalty and party popularity. But he will also know that no



#### G-MEN COMBAT CRIME

*G-men in the United States are members of the Federal Bureau of Investigation—a body that corresponds to Scotland Yard's Criminal Investigation Department. The picture above shows visitors to an exhibition organized by G-men to combat crime. Masks and possessions of noted criminals are on show.*

Cabinet successes will make up for his own failures, and that no Cabinet quarrels can precipitate his own collapse.

Below the Cabinet stretches the vast pyramid of federal civil servants, an army which, when last computed, numbered nearly three million officials. There was a time when the typical federal office-holder was an impermanent detail of the political landscape, liable to removal when the rival party came to power, or, at best, dependent for advancement upon the favour of an influential politician. That is no longer true. The ordinary American

civil servant is now recruited by methods of examination and 'merit' measurement which are not unlike the British system; he holds his job and obtains his promotion (or otherwise) whichever party is in power, and he brings to his work an integrity and application in no way below the standards of Whitehall.

A difference that does persist, however, between the British and the American systems relates to the point at which the line is drawn separating the administrator from the politician. In Britain the permanent heads of all departments are civil

servants, not removable on merely political grounds. In the United States there are few departments in which the highest officials are not "political" appointees, liable and likely to change with a change of political administration. This reflects, in part, a conviction that true political impartiality cannot be looked for from civil servants at a level where their decisions are so charged with political implications, in part a persistence of the tradition that "to the victors belong the spoils."

The stock of patronage thus made available is increased by the occurrence of a number of other "non-merit" jobs lower down in the administrative hierarchy, in one or two departments, such as the Post Office, in particular. Appointments to such jobs are in the gift of the President and his political advisers, they are at once a source of strength and of embarrassment to any administration, and the movement for their abolition is steadily growing.

The heart of the executive machine is to be found in what the Americans call the "old line" departments, the traditional great departments of state with titles and functions not dissimilar from their British counterparts. (Though for Foreign Office American usage employs State Department while the Department of the Interior superintends at once more and less than the Home Office more, in that, for example, it administers United States, territories overseas less, in that the law-and-order functions of the Home Office are, under the American federal system, largely reserved to the states.)

#### Growth of Administration

However, of recent years the operations of the American federal government have so expanded that there has grown up a bevy of new government agencies whose powers at times rival (and even overlap) those of the "old line" departments. The political climate of Washington, for various reasons, does not encourage the strong institutional growths of Whitehall, in consequence, instead of the traditional departments expanding to take in these new activities as, for example, our Board of Trade has done, new so-called "in-

dependent agencies" have sprung up to administer such varied items as government loans, shipping, labour and rural electrification. The President is, in constitutional theory, the embodiment of all executive power, these agencies have consequently found their legal roots in "the Executive Office of the President," and are responsible directly to him. In fact they form a jungle growth of great extent, which invites the hand of the administrative gardener to prune and to plant out in logical order. Various schemes of reorganization have long been awaiting the action of Congress.

#### President and Senate

In the appointment of his principal subordinates, who administer this vast machinery of government, the President does not have an entirely free hand. He acts, according to the Constitution, "by and with the advice and consent of the Senate." In practice a convention has grown up by which Senators do not reject the President's nomination for heads of departments, federal judgeships, ambassadors and the like, unless the nominee is judged unsuitable for reasons over and above the usual differences of party politics. By a tacit *quid pro quo* the President, for his part, does not generally make an appointment outside the District of Columbia without first consulting the preferences of the Senator or Senators of his own party representing the state concerned.

This is not the only respect in which the Constitution binds Senate and President in a close relationship. The section elaborating the President's authority over foreign affairs contains one brief clause of great significance. "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." In short, treaties negotiated by the President need ratification, and can be rejected by a minority of one-third of the Senate. No country has better reason to know and respect this clause than Great Britain, which has had more of its treaties with the U.S.A. thus amended or rejected than any other power, Mexico possibly excepted.

This restriction on the President's



powers had its origin in the feeling that for foreign commitments the Union needed something more than a bare majority: a country's foreign policy should be based on the greatest common factor of agreement and a federation, in particular, could not run the risk of a single official committing it absolutely to pledges which important sections of the country might not accept.

#### Senate and Foreign Affairs

Since its origin in 1789, the need of the President to get a two-thirds majority has been a formidable weapon in the hands of the Senate, with which famous treaties, like that of Versailles, have been slaughtered or mutilated out of recognition, and before which many a Secretary of State has hesitated even to embark upon the possibly fatal process of negotiation. "A treaty, entering the Senate," wrote John Hay, "is like a bull going into the arena: no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive. Had he lived to see the fate of the United Nations Charter, John Hay would have been obliged to amend so despondent a judgment but he would still have found the conduct of foreign affairs greatly complicated by the restrictive powers of the Senate."

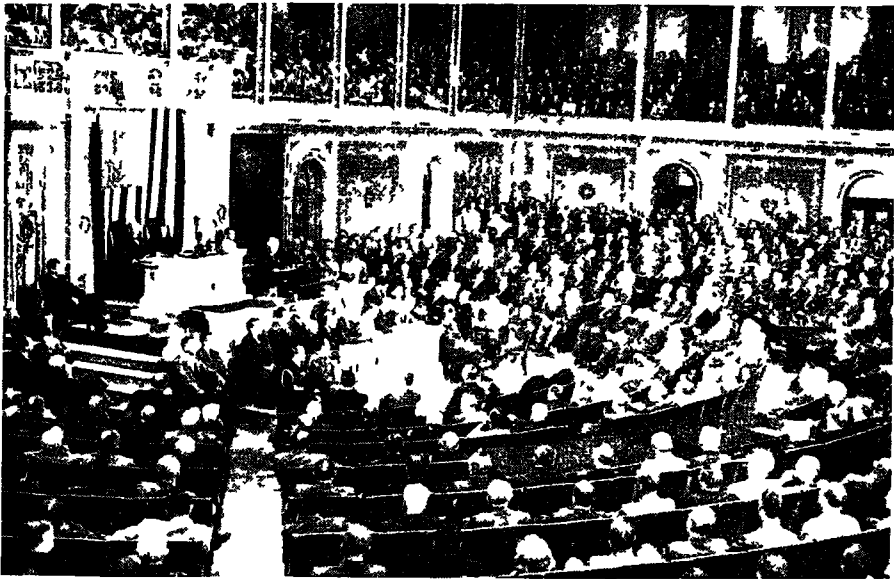
Those who uphold it point out with justification that the Senate has never rejected a treaty for which there was an unmistakable public demand—though the claim is not susceptible of precise proof. Those who oppose it complain of "minority extortion," and point to the unbalanced system of representation that prevails in the Senate. Those who have to live and work with it, in the White House or the State Department, have developed various techniques of circumvention. Thus certain foreign agreements may be presented, not as treaties, but as legislative proposals requiring only a straight majority in both houses of Congress: it was in such form that the Anglo-American financial agreements of 1945-46 were framed. Or the President may content himself with an "executive agreement," an international understanding which serves for most practical purposes though lacking the legal force of a treaty.

But these devices, though often useful and justifiable, leave the major problem unsolved—which is to harmonize the action of the executive and the wishes of the legislature in the day-to-day conduct of foreign affairs. It is a problem for all democratic governments, the peculiarity of the problem for America resides less in the two-thirds rule than in the whole separation of powers principle. It is in fact one aspect of the bigger problem, of co-ordinating the action of Congress and the President along the whole range of national affairs.

#### Presidential Veto

For coping with this major task the President is given, under the "checks and balances" principle, one specifically constitutional weapon. He can veto Acts of Congress. All bills must be presented to him: if he disapproves of one he is entitled, within ten days, to return it without his signature for congressional reconsideration. (If Congress adjourns during those ten days it is sufficient for him just not to sign—legislative murder by "pocket veto.") The President may use his veto entirely at his discretion—as a straight party weapon, to kill bills which embody opposition proposals; in the interests of good government, to suppress some attempt at one-sided legislation by a private member, or if he believes that the measure would violate the Constitution and be thrown out by the courts. The only check on his veto is his own prudence—not to clash with Congress unless he can win. For Congress is not obliged to treat his veto as final, if a two-thirds majority can be secured in both chambers the bill can be re-passed and automatically becomes law.

The effects of the veto system are not entirely beneficial. The knowledge that the President will act as long-stop is often used by Congress as the excuse for some pretty slack legislative wicket-keeping. When a pressure group demands partisan legislation it is tempting for Congress to grant the favour and leave to the President the unpleasant duty of withdrawing it again. Nevertheless, without some such weapon of control, the President, in all



#### PRESIDENT AND CONGRESS

*Senators and members of the House of Representatives meet to hear the President speak at a joint session of Congress. Here President Harry Truman, who succeeded the late Franklin D. Roosevelt, is seen in the course of his 1946 "State of the Union" speech.*

other respects separated from the legislature, would find his desk heaped high with legislation incompatible with his policies.

The veto is a negative instrument. What positive controls exist between the four-year irremovable President, the two-year House and the six-year Senate? How are the gears of the American system made to mesh?

Direction has to come from the President. He is one man, with a unified will and a policy. The Congress, by contrast, is a congeries of separate, often rival, aims and ambitions, which only at very rare moments in American history has been fused into one will and sustained there by the genius of some parliamentarian. The Congress, too, as we have seen, is the mouthpiece of localities. The President is a national figure. He is elected, not by Congress, but by the nation as a whole, however small his majority, it is bound to represent something more than a merely sectional interest. Whenever the nation wants to

think of itself in its truly national capacity and not in terms of its component parts it is the President to whom it looks for expression and for action. As Franklin Roosevelt put it soon after his election in 1932, "The Presidency is not a merely administrative office. That is the least of it. It is pre-eminently a place of moral leadership." Any such leadership is bound to find expression in a programme of legislation requiring Congressional support for its enactment.

#### The President's Recommendations

The Constitution always provided for the President making recommendations to Congress. Not only is he to provide information on "the state of the Union" (a kind of speech from the Throne written by a king who is his own prime minister), but he may also "recommend such measures as he shall judge necessary and expedient." A modern President will use these facilities to the full, and the result is likely to be a continuous stream of legislative proposals.

flowing from the White House to Capitol Hill for the President's supporters in Congress to steer through the shoals and currents of both chambers

For successful steering the President must depend on the skill and prestige of the Speaker, the Majority Leaders (American equivalents of the Leader of the House of Commons), the party Whips, and the chairmen of the committees principally concerned. To ensure the safe passage of his measure the President cannot count, like the British Prime Minister, on the ultimate threat of dissolution. Both he and the Congress are, for their respective terms of office, irremovable, and consequently his powers of coercion are always limited, and he will be well advised not to overplay them, for he and Congress have to go on living together. But if the President cannot force his measures through Congress that does not mean that he is powerless to speed them on their way.

#### President and the Nation

The first and crudest of the President's controls is patronage. He has jobs at his disposal, to be given as rewards to the faithful, to be withheld as penalties from the disloyal. It is not, of course, for themselves that Congressmen want jobs (for the Constitution debars them from holding any offices), but for their clients and supporters back home, upon whom they in turn rely for backing in the hour of re-election. It was said of President Roosevelt and his first Congress: "When he wished to marshal Congress behind his programme and to persuade Congressmen to risk the displeasure of important interests in their districts, he needed some means (such as patronage) of strengthening their position at home." The session indicated that the consummation of a national programme of legislation is greatly aided by transmuting through patronage the localism of our politics into support of the Chief Executive. As long as some external link between a separated President, House and Senate is needed the advantages of patronage will remain.

Yet it is a waning asset. As more and more jobs come under civil service rules

fewer are left for Presidential discretion. And public opinion views with increasing disfavour a system which was once a universally sanctioned instrument of government. Moreover, it is a two-edged tool. In making one friend, the patron may make a dozen disappointed enemies, while an incumbent, once installed, may bite the hand that feeds him.

For all these reasons patronage is a weakening instrument of control. Its place is being taken by the only truly democratic technique, the appeal to and evocation of public opinion. "The White House," said Theodore Roosevelt, "is a bully pulpit." From it congressional sinners may be effectively called to repentance, to the accompaniment of the meaningful chorus of applause or hisses from the general public beyond. The President's position peculiarly fits him, in fact, to appeal over the head of Congress to the nation at large, and to use the Congressman's fear of electoral defeat as a stick to keep him from straying from the path of political virtue.

The President's powers, in this respect, have been enormously enhanced by the invention of the radio. If he is a master of that medium, as, for example, Franklin Roosevelt was, he can establish direct contact between the White House and every home in the nation. But even before and without the radio his position is strong. He is pre-eminently and always news, and his messages are assured of a publicity which is irrespective of their popularity. Congress's case, through incompetence or confusion of voices, may sometimes go by default; the President's scarcely ever.

Not that the appeal over the head of Congress automatically guarantees success, as Mr. Harry Truman discovered in the first winter of his Presidency. It is only in moments of national emergency that the President can evoke a response which is irrespective of party. At other times the success of the President's appeals to public opinion will be a function of two variables—his personal prestige and his party's strength. For the President, no less than the Congressman, is a party man. He is, in fact, the party's chief. And it is this



#### CONVENTION IN PHILADELPHIA

*National Conventions are, in effect, pre-election elections. The parties choose candidates for the presidential campaign and draw up their political programmes. Above may be seen an enthusiastic banner-bearing crowd in a typical scene, in Philadelphia, the late President Roosevelt had just been nominated for re-election.*

role which provides him with his most consistently useful instrument of congressional control.

#### Political Parties

There is a sense, indeed, in which it is true to say that the American parties exist in order to elect the President. That is to say that the reason why the U.S.A. operates under a two-party system is the need which each party feels to capture the Presidency. America is a vast country, embracing within its borders almost every type of territory, climate, race and religion. It falls naturally into sectional units, each with its own special economy and peculiar interests and history—New England, the Middle Atlantic States, the South, the "Corn and Hog" belt, etc. It would be natural for a country of such size and diversity to breed a multiplicity of parties,

each representing a sectional or group interest, and each competing for the biggest voice in the government of the country. But in fact, for all serious political purposes, there are only two parties, the Democrats and the Republicans. Where third parties have come into existence their objective has always been, by propaganda and pressure, to secure the adoption of their ideas by one or both of the major parties. The Republicans in 1860 were the only third party who have been determined and strong enough to displace one of their two rivals, and then only in circumstances so exceptional as reasonably to be considered unique.

The principal reason for this is to be found in the system of election to the Presidency. The President is elected by popular vote, each State counting as a single constituency, and in consequence

any party which wants to elect a President must win votes all over the nation, it is not enough for it to have a merely sectional appeal, and carry, say, merely New England. In particular it must try and carry as many as possible of the big states of the Union—New York, Ohio, Pennsylvania, Illinois, Texas and California.

#### Polling in the U.S.A.

Here the effects are felt of a curious constitutional survival from the days when the voters did not directly choose the President but chose Electors in their several states, who then, in the exercise of their superior wisdom, chose a President at second hand. The Electors have long since been rubber stamps, registering merely the voters' preference, but it is still a majority of the Electoral College that is required for the election of a President, and since the Electors are distributed among the states in rough proportion to their population, and a fifty-one per cent in any state secures *all* the Electors of that state, it is obvious that the capture of the big states is all important. To capture the large constituencies, with a majority no matter how small, becomes the primary objective of election strategy. It is for this reason that the election contests in New York State count for so much and why, in an appeal to local loyalty, Presidential candidates are so often nominated from the Governors of New York—e.g. the Roosevelts, and Mr. Thomas Dewey. But along with this local attractiveness the candidate will still need to have a national appeal in a nation of a hundred and forty million people no one state and no one section can carry enough electoral votes by itself. The selection of this nationally appealing candidate is the task which falls to the party's National Convention.

The National Conventions are held by each party in the summer of each leap year—immediately preceding the Presidential and Congressional elections in November. Delegates from each state will attend and in a remarkable atmosphere compounded of tribal fervour, political principle and hard inter-sectional bargain-

ing, will choose a candidate behind whom the party can unite and to whom the floating voter of no fixed party allegiance will feel attracted. The clash of claims may be hard to resolve and the balloting for candidates may go on for days, but eventually by a kind of process of attrition rivals will be eliminated and the nomination will be made. The selected nominee then becomes the party's leader as well as its candidate for the Presidency.

With far less discussion or contention the Convention will also draw up a party programme. This will seem an odd document to anyone who reads it with British party programmes in mind. Instead of giving much indication of what the party proposes to do if it gets into power it will probably "point with pride" to the past glories of the party and "view with alarm" the alleged depravity of its rivals. There will be very little party doctrine in the sense in which British parties use the term but a great deal of intoxicating eloquence designed to produce a warm self-satisfied glow of party solidarity. Most surprising of all, the platforms of each of the two great parties, Democrats and Republicans, will, in most years, be strangely similar: they will appeal to different gods (the Republicans probably to Lincoln, the Democrats to Jackson), but they will intone almost identical prayers. Or as the cynical American journalist remarked to Lord Bryce, they will be like two bottles each bearing a label denoting the kind of liquor it contains, but both empty.

#### Party Alliances

The journalist's cynicism was not however, altogether justified. American parties lack the doctrinal distinctiveness of British parties because they are, in essence, alliances. They are alliances because while the contest for the Presidency forces parties to organize themselves on a nation-wide basis, the size and diversity of the country make it impossible to find genuinely nation-wide issues and interests. The political organizer has therefore to try and find those issues and those interests which are least incompatible and out of these to form a national front which will in fact

be an alliance of sectional units. Thus the Democratic Party of Roosevelt formed an alliance between the traditionally Democratic South, the labour elements of the big cities and the impoverished farmers of the Middle and Far West. This included elements which were both conservative and radical, both isolationist and internationalist. The Republicans similarly enrolled the progressives of the Northern Midwest, the conservative well-to-do of the Eastern and Midwestern towns, and the traditional Republicans of New England.

#### Political Differences

The battle between conservatism and liberalism has to be fought, in consequence, *within* the party—in the choice of candidates for Congress, at the Party Convention, and inside Congress whenever the bonds of party discipline are strained by the clash of rival doctrines.

The politician of principle has always to be adjusting the claims of his political ideals, which may run counter to the present bias of his party, and the claims of his party loyalty. If he settles outright for either he is lost: if he determines to associate only with men of his own views he must resign himself to relative impotence—there will simply not be enough of them to capture and retain the seats of power, if he is slavish in his party loyalty he will empty politics of all meaning except the universally comprehensible concept of the "pork barrel." The choice is often a difficult one, and the system strains hard at the indulgence of the perfectionist.

But it is only by such compromise and adjustment that government over a huge and still imperfectly integrated continent can hope to maintain itself. There is always present to the American mind the memory of an occasion when the experiment broke down, when compromise and adjustment failed, when a nation-wide issue dividing party from party was found—in slavery. The result was the American Civil War. Since then the American nation, while the wounds even of that conflict were still gaping, has been amassing territory and absorbing immigrants, a nation always in process of coming-to-be. In that process

the national parties, just because of their technique of compromise and alliance, their maximization of agreement, and minimizing of difference, have been a great unifying factor, and that less than sea-green incorruptible, the American politician, has with all his faults, served as the agent of what the Constitution called "a more perfect Union."

It is obvious that with so much power lodged in the parties, and with the virtual impossibility of a third party wresting power from the two great going concerns, the Republicans and the Democrats, the healthy functioning of American democracy depends a good deal on the internal organization of the parties.

#### Burdening the Voter

Here, it must be admitted, democratic zeal has created certain obstacles for itself. In their desire to make elective as many offices as possible the Americans have placed a burden on the voter so heavy that he is in some danger of being crushed by it. Not only has he to vote for his federal rulers—President, Vice-President, Congressmen—and for their equivalents in state governments—Governor, Lieutenant-Governor and state Congressmen. He has also to vote for a host of civic or local government functionaries, many of them essentially technical experts, such as commissioners of roads or sanitation. To guide the voter through these complexities the professional politician arose, who, in each party, "organized" the nomination and "brought out" the vote, reducing the complex decisions which faced the electorate to a simple alternative, the straight Democratic or Republican ticket. But this in turn bred its obvious evils—the political machine with its unscrupulous "boss" and its trafficking in corruption as well as in patronage.

Persons who wished to introduce into politics some elements of reality and civic virtue other than those implied in the alternative of the "Ins" or the "Outs" realized that reform must begin *inside* the party machines themselves. The party structure itself must become democratic. To this end they instituted the party "primaries,"

Public Notice.  
 All citizens of Hornitos  
 are respectfully invited  
 to attend the  
**HANGING of CHEROKEE BILL,  
 HORSE THIEF**  
 Meeting at Rattlesnake Ike's Saloon.  
 Miners Court May 12th, 1851  
 7 O Clock—Night  
 Hornitos Times—Printer  
 Thomas Early—Sheriff

#### EARLY JUSTICE IN THE UNITED STATES

*A relic of pioneering days—rough and ready justice was meted out to those unlucky enough to be caught*

which are now sanctioned and regulated by law in every state in the Union. The "primary" is an election within the party itself, in which persons registered as party members elect both the party officials and the party's candidates for federal, state and local offices. It would be an exaggeration to say that this device has fully realized the expectations of its inventors, because it suffers from the grave drawback that it still further multiplies the number of occasions and the number of candidates about which the already overburdened voter has to exert himself and make up his mind. But it does furnish a weapon which an aroused public conscience can, whenever it chooses, make effective.

Furthermore, in view of the lack of political programme in American parties, the state primaries furnish an instrument by which conflicts within the parties themselves can be recognized and resolved.

Thus in respect of Congress, the primary elections may often be as important in determining the political complexion of a

state's Senators and Congressmen as the open elections which will follow a few weeks or months later. Indeed over one large area of the United States they will be far more important. The "solid South" is a region which recognizes only one party—the Democrats. Historical memories of the Civil War and that unhappy post-war Reconstruction period when the victorious Republicans of the North foisted negro Republican governments on the defeated states, have served to make Republicanism a forbidden creed in the old South and to leave Democratic candidates almost always unopposed. In these circumstances the primary becomes the real election and the candidate who wins the nomination can take the rest for granted.

The result of all this—of the multiplication of governments and the elaborate articulation of all the working parts—is to make American democracy a highly complex mechanism. An inexperienced British observer watching it at one of its moments of most rapid revolution—say, on an election day—would marvel that so intricate a piece of machinery could be worked at all. But gradually he would discover the moving principle—where a mere reading of the Constitution would least encourage him to look for it. The Constitution-makers, like good eighteenth century faction-haters, congratulated themselves on devising a constitution which would banish party from the scene. In fact, by their separation of powers, they were creating a disunity of parts which made party indispensable. It is party that links President, Senate and House. It is party that maintains the federal system and makes it intelligible to the ignorant voter, waving its party colours in each State of the Union and focusing ultimate attention always upon Washington, the party's citadel and goal.

It is party that in the contest for the Presidency dramatizes for the nation every fourth year the paradox of America's identity through difference. As a multi-sectional alliance the American party must necessarily be, as we have seen, an imperfectly harmonized combination of parts. In that respect it partakes of the nature of the Federal Union itself.

But just as the Union moves towards closer integration, through the decisions of the courts and the expanding power of President and Congress, so the parties keep pace with the growth of national consciousness of the United States. By degrees the distinctiveness and exclusiveness, historical, economic, racial and cultural, of the component sections of America is breaking down. There is a growing recognition of interdependence, a rapid racial fusion in the melting-pot, a steady diversification of regional economies.

The result of this is an increasing emergence of nationwide party issues—labour v capital, government control v free enterprise, international co-operation v "the open door at home," etc.—and an increasing admixture of doctrinal content in

party promises and performances. To this extent it has been possible to recognize a predominance of the "Left" in Democratic Party councils and of the "Right" in Republican.

This, however, is an intermittent process. If it is, as some contend, an ultimately irresistible one, it is also most certainly, a tide whose backwash will often lose ground that had appeared well won. Localism, sectionalism and particularism will continue to check in some degree the national consciousness of American government and party for just as long as they remain real forces in the culture and economy of the United States. So long as their vitality remains it is the function of American democracy to take cognizance of them, and the quality of that democracy's machinery must be judged by its flexibility as an instrument of adjustment even more than by its vigour as an agent of acceleration. So judged, it may fairly claim to have realized the ambitions of its founders 'to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.'

### Test Yourself

- 1 On what principle are powers divided between the central government and the governments of the several states?
- 2 What is the most essential difference between the functions of American and British courts?
- 3 How does the function of a committee of Congress differ from that of a committee of the British Parliament?
- 4 How does the American Cabinet differ from the British?
- 5 How are treaties made under the American Constitution?
- 6 What is the basis of representation in the Senate and in the House of Representatives respectively?
- 7 Why is it so important for a presidential candidate to capture the big States by however small a majority?
- 8 How is the absence of any clear dividing principle between American political parties to be explained?
- 9 What is a "primary," and what is its object?

*Answers will be found at the end of the book*





#### POLITICS IN PARIS

*Political opinion in Paris is always lively. Above is seen a group of demonstrators showing their support of M. Blum's Left Wing party.*

# LAW AND GOVERNMENT IN THE EUROPEAN DEMOCRACIES

THIS chapter sets out to show how the various countries of Western Europe have tried to apply the theory of parliamentary democracy in practice, what advantages and disadvantages these various applications have, and what are the common ideas behind the separate and superficially very different governments of France, Belgium, Holland, Norway, Sweden, Denmark and Switzerland. These are the countries of Europe which have remained constant to the tradition of democracy for many years.

## The Importance of Democracy in Europe

Since the liberation of Europe from German rule, the systems of government in the countries most affected have been thrown into the melting pot. In neutral countries, such as Sweden and Switzerland, old democratic systems have survived and go on working very much as before. In some liberated countries, such as Norway and the Netherlands, the pre-war system of a constitutional monarchy and parliamentary form of government has been restored almost intact. In others, such as France and Belgium, there have been more striking changes, due to the breakdown of the old system. But everywhere—even where things seem almost the same as before—there have been released powerful new forces, some of them seeking a more thoroughly democratic order in social and economic life as well as in political life, and some of them challenging the whole basis of democratic government as it has been known in Western Europe for generations past. This means that suddenly, as in France, or gradually, as in Belgium, law and government will change.

For although the general principles of democracy remain little changed, laws and forms of government are like pantomime animals: they only come to life and mean

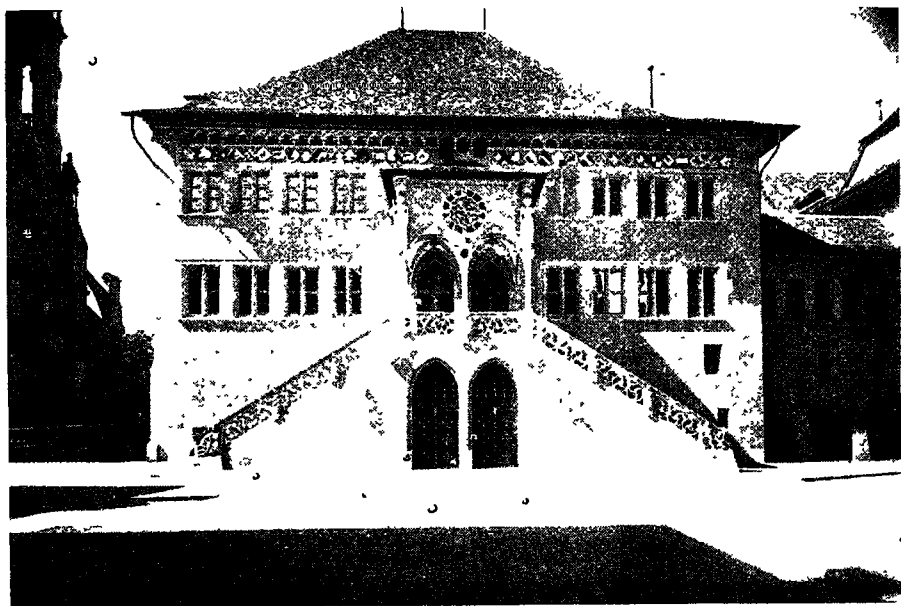
something when men get inside them and make them work as they should be made to work. They have to be changed to serve new needs and shifting social conditions. The Second World War deeply affected ordinary life in the European countries. During German occupation, and during the period of reconstruction which followed liberation, the ways in which ordinary people lived and worked were completely altered. Why, then, is it worth studying law and government in these countries before the war? Is it not more worthwhile—is it not enough—to study the social changes which have altered them?

Certainly it is very important to study these social changes. But the war taught people something else as well as the need for social overhaul and economic reconstruction. It taught them not to underestimate the importance of legal and political forms and constitutional procedure. That is why France, for example, took so long to consider and frame the Constitution of the Fourth Republic—the democratic system with which she wants to replace the Third Republic of pre-war days.

## Steps Towards Social Progress

What may seem drier subjects than social conditions—questions whether it is better to have a king or a president, and what his powers shall be, who shall have a vote and for whom he shall vote, what kind of law court tries the citizen if he breaks the law, and what are the ways of changing the law—are realized as being no less important matters than who is his foreman, how he makes his living, and what happens if he is unemployed.

It may be that before the First World War too much attention was given to constitutional questions. Perhaps it was too often taken for granted that if only



TOWN HALL AT BERNE

*The fine fifteenth-century town hall of Berne, political capital of Switzerland and of the canton that bears the same name. It entered the Swiss confederation in 1353*

everybody had a vote and parliament was really made representative of the whole nation, then general happiness and progress would be bound to follow. But between the two wars—between 1919 and 1939—people tended to argue too much the other way. When democratic government did not automatically bring general happiness, and even failed to keep pace with the vast and rapid changes in social conditions, people began to despise political and constitutional questions. Dictatorships rose and flourished as soon as people lost interest in questions of civic liberties. For example: Who shall have a vote and how shall he use it freely? Who shall act as parliamentary representative, and what powers shall he have to control the government? Who shall protect the rights of the ordinary citizen against the government, if it should pass harsh laws or behave irresponsibly? It is not true, as so many once thought, that to find the right answers to these questions will bring social progress and security automatically. But it is true

that unless the right answers are found to these questions, social progress and security are unlikely to come at all, and if they do come they will be short-lived.

If we are to think about these questions and find our own answers, it is a good way to begin by discovering what answers have been given by the nations which are our nearest neighbours, and what new answers they are looking for amid the great new problems which confront them after the war. It so happens that France has been the great pioneer in developing democratic ideas and institutions in Europe. We can learn most from her. Belgium has a constitutional monarchy very much like the British, and a large overseas empire; and she has always modelled her own law and government very much on the French pattern. Holland, likewise, owes many of her democratic ideas and institutions to French influence. The fountain head of modern democratic law and government in these lands is the great French Revolution of 1789, which first pro-

claimed the ideals of "Liberty, Equality, Fraternity," and attacked all the old order of despotism and privilege with its demands for the sovereignty of the people. The wars of Napoleon spread these ideas all over Europe.

But democratic government in Europe has two quite different and much older roots as well. In Switzerland, the oldest of all democracies in the modern world, civic liberties and institutions of self-government date from 1291. She is the only nation in Europe which has always been a republic. Switzerland has in every way been an exception to the general trend of European development but just because she is unique, she holds valuable lessons in democracy for everyone else. The Scandinavian nations, Norway, Sweden and Denmark, have also quite distinctive democratic traditions of their own, dating from earliest recorded times. Local and national assemblies which preserved some real independence of the king have always been a feature of Scandinavian government: the share of ordinary citizens in local government and law-making has always been great. But full representative government within the framework of a constitutional monarchy is in all three countries a relatively recent growth and this has been strongly influenced by British and French example.

#### The Social Basis of Democracy

Democracy works most smoothly in small countries which have strong and sturdy local community life, as in the Swiss communes and cantons, the Belgian and Dutch towns, and the Scandinavian villages. But whilst these miniature models of working democracy are of value and interest in themselves, and serve as a reminder that democratic government must depend, in the long run, on the spirit and energies of ordinary citizens, there is a limit to the transference of these models to larger and more highly industrialized countries. Switzerland and Scandinavia owe their special traditions to peculiar geographical position. The Swiss mountaineers in their Alpine valleys or the Norwegian fishermen in their fjord hamlets

live by nature in tiny communities, cut off from one another and given great natural protection against invasion from abroad and tyranny at home. None of the nations mentioned is large in total population. The Swiss number just over four million, and the largest Scandinavian country, Sweden, has just over six million.

But the intensity of local community life matters as much as total numbers and that may be roughly seen from the density and distribution of population. The contrast between the smaller and greater democracies in these respects is shown by the following table.

Country (1936)	No. of people per sq. m.	Population of capital	Largest (or next largest) town
Denmark	237	843,000	91,000
Norway	22	250,000	98,000
Sweden	35	533,000	280,000
Switzerland	256	112,000	320,000
Belgium	702	900,000	270,000
Holland	627	470,000	782,000
France	197	2,800,000	914,000
Britain	468	8,000,000	1,090,000

It will be seen from this table that France is like the smaller democracies of Western Europe in that her population is more thinly spread over the whole country, but more like Belgium and Britain in that her larger towns are very large. This reflects the fact that France is more agricultural than Belgium and Britain, her nearest neighbours, but more industrialized than the smaller democracies. She is, in fact, about half-way between the two in the balance of her economic life, and, even after the great strides made in the development of her industries after 1914, some forty per cent of Frenchmen still made a living out of agriculture in the nineteen thirties. Her political life was really based on the thirty-six thousand communes of the countryside—villages and small market towns having more direct influence on her national policy than the big industrial centres and ports. This, as we shall see, affected the whole meaning of democratic government in France.



#### SWISS ELECTIONS

*In parts of Switzerland the inhabitants of several villages meet each year to elect their government representatives. These meetings, as may be seen from this picture taken in the canton of Appenzell, are informal, but new laws are drafted and the budget approved.*

This question of what proportion of a nation lives in small rural communities and what proportion in big towns reveals perhaps the most important difference between the various democratic countries mentioned above. Where small villages and towns predominate, parish and municipal politics are very intense. Everybody knows everybody else, local government can be a very personal business in which every voter can take part, even national parliamentary elections have to be run on issues of local or at most provincial interest. Where big towns predominate—as in Belgium or Great Britain—politics are much less intimate and personal, general national interests of trade, indus-

trial production and labour problems loom largest in national politics, and tightly packed masses of people are swayed more easily by new ideas and political movements. Historically all over Europe towns and the middle-class business people who live in towns have taken the lead in both nationalist movements and in democratic movements, always with the solitary exception of Switzerland.

One or two examples illustrate the point. In France, in 1929, there were ten million qualified voters, and one million two hundred thousand of them were candidates for election to the councils of the communes—that is, twelve per cent of the possible voters were willing to take an

active part in local government. As four hundred thousand of them were elected, four per cent of the whole electorate held office in local government councils. In one little hamlet, where there were only eight voters to fill the necessary ten places on the communal council, two men had to be borrowed from the next village. And in France, where government tended to be very highly centralized in Paris, communal councils and their mayors still kept considerable powers in their own hands.

Being responsible for police, schools, hospitals, parks, thoroughfares, water supply and municipal undertakings of all kinds, the mayor—a popularly elected official—was one great keystone of democratic government in France before the war. The mayors of the larger towns, during the period of liberation, played a crucial part in reconstruction, rivalled only by the great work of many French mayors in reconstruction after the First World War. Whereas the mayors of English towns and the parish councils of English villages have a larger share in running the country than we realize, they are in general much less important than the French mayor or the mayors of Belgium, Holland and Norway. The French or Belgian mayor would often (like M. Herriot at Lyons) be the town's parliamentary representative as well and a man of wide political influence in the whole region, if he were mayor of a large town. The mayors of these countries often took a lead in local resistance to the German military occupation during the war. The Mayor of Narvik, in Norway, became famous for his courageous resistance and his eventual escape to Britain.

#### Importance of Local Government

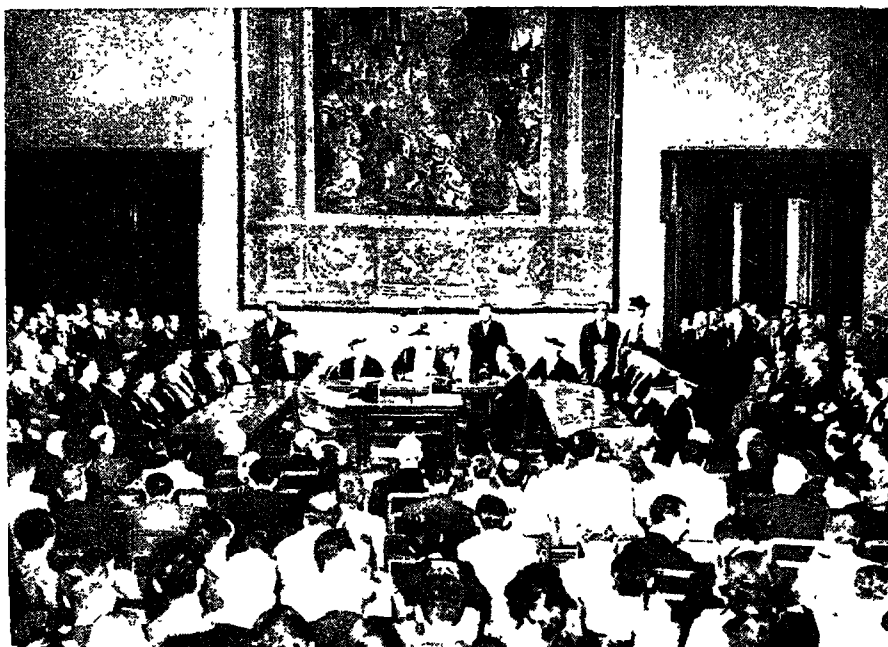
Here, then, is the real social basis of democratic law and government in Western Europe: active self-government, through representative institutions of local government. There is a more direct link between local politics and national politics in continental Europe than in Britain, in the sense that national politics and even parliamentarians themselves are more often directly drawn from local politics. In

Switzerland this direct connexion is very close. The most important unit of Swiss political life is the canton, and there are twenty-two of them, varying greatly in size. Swiss Government is, in form, a federation of these cantons. There is a Council of States to which each canton sends two representatives, as in the Senate of the United States of America. There is also a National Council elected (since 1930) on the basis of one representative for every twenty-two thousand people. These two bodies, meeting together every four years as the Federal Assembly, elect the government of seven men which is known as the Federal Council. The rights of the cantons are fully protected in the constitution: for example, no constitutional change can be made unless it has been approved by a direct vote of the majority of the people and also by a majority of the twenty-two cantons.

#### From "Representative" to "Responsible" Government

Generally, European democracies have pinned their faith to the institutions of representative government—that is, to elected parliaments, which in turn control the government and administration. The idea of elected parliaments was borrowed by most European countries from Britain or France, sometimes from Britain through France. Members of parliaments were originally regarded as representing local communities, which is why we have a House of Commons. Communities—commons—communes—obviously all have much the same idea behind them.

A local community, like a village or a town, could be said to be represented when one of its leading and most influential members went to attend a national assembly and the country as a whole—the community of these communities—could equally be said to be represented by the general assembly of such spokesmen from all localities. There naturally grew up the belief that these spokesmen were more truly and reliably representative if they had been deliberately chosen by the localities according to certain rules of election. So representative government



#### ITALY BECOMES A REPUBLIC

*The people of Italy, after experiencing government by king and dictator, elected to become a republic after the cessation of hostilities in the Second World War. The picture shows the announcement of the election results in June, 1946, in the supreme court in Rome. A new constitution was approved in December, 1947.*

came to imply voting at general elections for members of the national parliament. And guarantees were devised that such elections should be free and even secret to prevent bribery or intimidation. The freedom and rights of the citizen, which we call civic liberties, are thus implied and involved in the business of producing a national assembly of men who can rightly be regarded as expressing the broad opinions and interests of the whole country.

But there is obviously some discrepancy between this neat and logical picture, and actual conditions. With the immense growth and redistribution of population—especially with the growth of big industrial towns—the basic unit of a compact and intense local community becomes less and less real. Constituencies which members of parliament are supposed to repre-

sent become artificial areas, defined simply for convenience. They are the "electoral districts" or "wards," which are not always real communities at all. And the question arises: how can one man in any real sense represent either the interests or opinions of a very large and mixed population within an area whose limits have been more or less arbitrarily fixed? This problem concerns industrial and urbanized nations like Belgium and Britain more than agricultural and rural countries like Norway and Denmark, where the unit of social life is still a real community.

This difficulty has been overcome in two ways. One has been the rise of large organized political parties, which find and put up candidates at elections. These may often be men quite new and unknown to the constituency. They stand not as representatives of the locality so much as

representatives of a broad national policy or a general set of opinions which cuts across all constituencies. This has been a feature of all European democracies—including Switzerland. The other way is frankly to treat representation as the fiction it now is, and to emphasize the value of "responsible government."

#### Overthrow by Legitimate Means

The most important difference between democracies and dictatorships in modern times is not the difference between countries which have representative institutions and countries which have not. Mussolini kept the apparatus of parliamentary government and even the Chamber of Deputies itself, until 1939, and both he and Hitler made much of plebiscites—direct appeals to popular vote on important issues. The real difference is between countries whose governments can be overthrown by popular action through regular constitutional methods, and countries whose governments cannot be overthrown at all except by violent revolution. The value of elected parliaments is measured not by how exactly they reflect the various shades of public opinion, but how effectively they can control the government, criticize and mould its policy, and remove it from power when it follows policies opposed by a majority of parliament. This is what ensures responsible government. The constitutional machinery of free voting, general elections and organized political parties contesting for parliamentary majorities, is necessary to make and keep parliaments responsible—and also responsive—to public opinion. But no less important is the ability of parliaments to make and keep governments responsible for their actions to parliament and people.

These two questions must now be considered separately but first it is important to realize how closely they are connected. In Britain, for example, there is no way by which the electorate can dissolve parliament or recall a member of parliament, and there is no way by which it can throw out a government so long as a majority in parliament gives that government its support. All it can do is to wait until

the next general election and then return a different majority. The same is true of every continental democracy. There is some importance then in the length of time a parliament can continue without submitting to a general election. In Britain and France it is now five years. In Sweden, Norway, Belgium and Holland it is four years. And there may be a close connexion between how long parliament can run without being dissolved and how long a government can stay in office. In France, where the old Chamber of Deputies was never after 1877 dissolved before the end of its four-year period, it could overthrow a score or more governments in that time without running any risks of being itself dissolved. The British House of Commons would certainly be dissolved if it behaved so irresponsibly.

#### Responsibility of Parliament to People

The first important question about the responsibility of parliament to people is how far a majority in parliament represents a corresponding majority of the electorate. Where there are several parties each of which may put up candidates at elections, the man coming top of the poll may not represent a majority of the whole constituency. If the vote has been splintered between several candidates, he may represent only a third or a quarter of the total votes in that constituency. Further, if a large number of the candidates of one party win seats by this kind of splintered voting, they may form a majority in parliament without in any way representing a majority of the voters. To prevent this, various kinds of proportional representation have been tried in European countries. Their aim is to make the balance between parties in parliament correspond broadly to the balance of support they hold in the country. All three Scandinavian countries, Belgium, Holland and France have experimented with proportional representation. France tried it in a very limited form between 1919 and 1927, and in the general elections of October, 1945, for the Constituent Assembly, she tried a very complete scheme. It resulted in the election of three strong and almost equally



balanced parties—the Communists, Socialists and Catholic Democrats and a number of small groups. In the first general elections of the Fourth Republic, in November, 1946, it produced an Assembly in which no single party had a majority and even the two largest together had only a bare majority.

An equally important question is what proportion of the people has a vote. In several countries, notably France and Belgium, the representative character of parliament has been distorted by restrictions of the franchise. In neither were women given the vote before the war, but in France since 1945 women have votes equally with men. Just as in Britain many business men and university graduates were for long given two votes, so Belgium experimented with a plan for giving supplementary votes to certain men with property or educational qualifications. This weighting of voting power runs contrary to French and Scandinavian democratic ideas of equality and has been avoided in these countries. It is very doubtful whether it does anything to make parliament more responsible to public opinion and that is the most important test in modern conditions.

#### Rights of Freedom

In addition to voting power, responsibility of elected parliaments to public opinion is secured by granting rights of free speech, free Press, public meeting and public association to the ordinary citizens. Only by using these rights can they criticize, guide and control parliament and only so can citizens play that active part in the government of their country which a real democracy requires. It is significant that these rights are the first to be attacked and destroyed by would-be dictators. These rights as they exist in Britain are discussed elsewhere in this book, but the different ways in which they are regarded and safeguarded in European countries are worth some attention.

In France and in a country like Belgium which has been very much influenced by France these rights are usually laid down

in a Declaration of Rights. This Declaration was often made part of a written constitution and declared—as it is also in the United States Constitution—to be sacred and inviolable. The greatest European example of this was the French Declaration of the Rights of Man drawn up in 1789. Versions of it were included in nearly all the French constitutions of the nineteenth century, and a revised version was drawn up for the Fourth Republic in 1946.

But it was not, curiously enough, included in the constitution of the most successful and durable democratic constitution which France has yet produced—the Third Republic. This was because the Republic was set up timidly and gradually between 1870 and 1875 and much of the old working system of government was carried forward unmentioned. The makers of the Third Republic regarded it in many ways as a sort of continuation of the short-lived Second Republic of 1848, and that had undertaken “to protect the citizen in his person, his family, his religion, his property, his work and had guaranteed freedom of association, public meeting, speech and Press. But because these rights were not given the practical legal protection which they are assured in Britain, they had to be re won gradually during the Third Republic. Freedom of the Press was not ensured in France until 1881, the right to form associations like trade unions only in 1884 and unconditional right of free public meeting only in 1907. Because the country was so deeply divided in opinion, and powerful sections of the nation were opposed to democracy and parliamentary government, Republicans feared these freedoms would be used to overthrow the Republic, and agreed to sanction them only after France had settled down to a period of greater stability.

#### Responsibility of Government to Parliament

It makes little real difference at least in European democracies whether they are monarchies or republics in form. A constitutional monarch fulfils very much the same functions as the president of a

republic. The three Scandinavian countries, Belgium and Holland are, like Britain, constitutional monarchies. France and Switzerland are republics. But the role of parliament in the State and the responsibility of ministers to parliament are remarkably alike in either form of government.

The king or the president is formally head of the executive power, and usually, therefore, in nominal charge of the armed forces, foreign relations, and the making of treaties. He represents the unity of the State, and performs ceremonial functions on all important State occasions. Monarchs have the advantage, as a rule, of inspiring more widespread popular affection and personal loyalty than a president, who is elected for a limited number of years and has often been a party leader before his election. But a great national figure, like President Masaryk of Czechoslovakia, who was closely associated with Czech struggles for freedom and independence before 1919, may inspire no less deep popular devotion than a hereditary king. To make the head of the State a kind of repository for reserve powers in case of emergency is one way of strengthening the framework of order and unity. When parties are at sixes and sevens and a coalition with majority backing in parliament is not easy to find, the king or president can even play an active and very helpful part in finding a suitable alignment of parties.

The principle is usually maintained that, in theory, Ministers are the king's Ministers, or that the president is head of the executive power. But responsible government demands that Ministers should be held answerable to parliament for their policy and actions. The constitutional laws of the Third Republic laid down that "Ministers are collectively responsible to the Chamber for the general policy of the Government, and individually for their personal actions. The President of the Republic is responsible only in the case of high treason." These provisions were repeated in the new constitution of the Fourth Republic in 1946. This responsibility is ensured simply by the power of the



FRENCH VOTING POSTER  
*A striking appeal to French voters on behalf of the new constitution of 1946*

Chamber (or of the Senate) to outvote and withdraw support from the government, and thereby make government impossible.

Ministerial responsibility, however, means, of course, many other things less drastic than this. It means that every government knows beforehand that it must frame laws and pursue policies in a way which will make them acceptable to the majority of parliament; that it will have to defend its actions against organized criticism in parliamentary debate and questions; and that inefficiencies or blunders are liable to be probed by the opposition groups and freely ventilated in the country. A party which is not willing to be held responsible in this way must either lose its support and fall, or attempt to guarantee its own irresponsibility by the use of force and a rule of terror. That is why the existence of private party armies and uniformed, disciplined bands of the



*Parliamentary government*



*elected by the people*



*with freedom to differ and criticize*

## Democracy

IN RECENT decades history has recorded a mighty clash between democratic and despotic governments

Democracy is generally held to be a system of rule whereby the people are made responsible for their own government and the government remains responsible to the people. Election of parliamentary representatives by secret ballot ensures that no pressure other than the appeals of conflicting political parties, is brought to bear on the electors to vote for one man rather than another.

In a democracy, too, freedom to criticize is a valued right, whether the criticism is voiced or printed, delivered in public assembly or in private discussion.

Criticism, in fact, is a safeguard against the possibility of power passing permanently to a single party or group of interests and its importance is so far accepted in Britain that the leader of H. M. Opposition in Parliament, regardless of his views or programme, is paid a fixed salary in recognition of his useful function.

## v. Despotism

TYRANNY is not a new phenomenon in world history. The twentieth-century brand of tyranny gained power in several European countries after the First World War, when, in chaotic conditions of insecurity and want, large masses of people supported those who put personal inspiration and strong-arm methods before principle.

Government by dictatorship implies the domination of a party quite as much as the domination of its leader, though in all dictator countries, however they may differ in their political aims and regimes, the party in power claims to have attained its position by "the will of the people."

In actual fact it achieves power by overcoming opposition, and maintains its power by eliminating it through the instrument of a political police force, which is not subject to public scrutiny and which may cause many to support the party through fear.

Those who oppose the party openly or covertly may be deprived of their civil rights, or, condemned to a worse fate.



*Despotic government*



*maintained by armed political force*



*with death in the prison camp for opposition*

kind which Mussolini and Hitler were able to build up, and which Sir Oswald Mosley attempted to organize in Britain before the war, are the death of democracy.

European democracies had to tackle this problem in the nineteen thirties. Party bands wearing coloured shirts and conducting organized demonstrations tried to provoke disorder and even challenge the authority of parliament. They tended to appear in every European country, recruited usually from ex-Servicemen and the ranks of unemployed. In France the *Cri de Feu* movement of Colonel de la Rocque and several other similar bodies became so powerful that by 1934 they staged riots in Paris and threatened the overthrow of parliament. The Rexists in Belgium and the followers of Quisling in Norway—often helped financially by anti-democratic forces in Italy or Germany—were specimens of the same type of movement.

Everywhere they were either disbanded and made illegal, as in France and Britain, or else they seized the opportunity of foreign aid—like the followers of Henlein among the Sudeten Germans in Czechoslovakia or the Quislings in Norway—to put themselves in power and kill democratic government.

#### Organization of Political Parties

It is clear, then, that democratic government everywhere depends on the existence of political parties of a certain kind and the suppression of political parties unwilling to submit to the rules of ministerial responsibility to parliament. If a large number of small, shuffling groups is the sickness of democracy, the appearance of a large, over-disciplined and regimented movement, repudiating give-and-take methods, is the very death of democracy.

There have been two responses in democratic countries to this kind of threat, or to any acute threat to national stability in finance or national security. One is the rallying of all parties which believe in democratic institutions into a special coalition to "save the constitution." This was the basis of the French *Bloc des Gauches*, or coalition of the Left, in 1905, when the Republic was threatened by the

power of Army and Church in the famous Dreyfus Affair and again of the French Popular Front in 1936, when the semi-fascist bands had been active and France was faced with constant political crises. These emergency coalitions may cover a wide range of the party spectrum, and may even (as in Britain in 1940) include practically all parliamentary parties in a National Government. Such rallying of parties usually lasts only as long as the emergency—if that—and they naturally tend to break up into their component groups as soon as domestic issues again come to the forefront of politics.

The second common response is a grant of emergency—almost of dictatorial—powers to the government. The two steps are usually combined, since only a government in which all main parties are represented is felt fit to be entrusted with such drastic powers. During the nineteen thirties French governments increasingly asked parliament for plenary powers which would enable them to pass decree-laws to cope with the crisis, whether it was financial, political or international. During his premiership, in 1935, Laval issued some five hundred such decrees, although some of them seemed to have little to do with the financial crisis. One prohibited foreigners in France from keeping carrier pigeons.

French experience showed that overmuch use of plenary powers was a danger to freedom, and when the Popular Front governments of 1937-38 asked for them parliament refused. War, or the imminent threat of war, usually leads to some such surrender of power to the government. In 1939 the French Plenary Powers Bill giving the Prime Minister almost unlimited discretionary power, passed through the Chamber and Senate by a large majority. In Britain, by the Emergency Powers (Defence) Act of 1939 and its extension in May, 1940, it became constitutional for the government to issue Orders in Council and Defence Regulations "requiring persons to place themselves then services, and their property at the disposal of His Majesty." Parliament, indeed, kept the right to annul any Defence Regulation of



### VOTING IN FRANCE

*Electorals in Paris study the propaganda posters which plead the cases of the different parties in the French national elections of 1946. Left Wing parties tend to be better organized than the Right Wing, but in spite of this no single party obtained a majority.*

which it disapproved but parliamentary control like many of the citizen's normal liberties goes at least partly into cold storage during war. Most European democracies, however, have devised ways by which parliament can even then sustain criticism of the government and can resist arbitrary use of emergency powers.

Control by parliaments over governments in normal conditions depends, as already suggested, on their power to overturn ministries. The closeness of this control depends on detailed arrangements of parliamentary procedure, and on the strength of party organization. France had a device known as *interpellation* which proved one of the deadliest weapons of

the Deputies against the ministry. Every member of Chamber or Senate was entitled to ask a question which the Minister concerned had to answer in detail. He had to defend either single decisions or general policy in open parliamentary debate and the vote with which the debate ended was equivalent to a test of confidence in the government. During the first fifty years of the Third Republic three out of every five ministries resigned over an adverse vote of this kind. The power of *interpellation* put the whole ministry at the mercy of any individual member of parliament who chose to force an issue about which the government was not in tune with parliament.

This drastic device was not popular elsewhere in Europe, but a common way of controlling government is through standing committees of parliament dealing specially with one branch of policy. The French Chamber and Senate set up twenty such committees (for finance, foreign affairs, and so on) on which all parties were represented in proportion to their strength in parliament. This meant that every important Minister had not only to face the Senate or Chamber as a whole where he might be subjected to *interpellation*, but also a miniature Senate or Chamber consisting of men who specialized in his own department. The committee could cross-examine the Minister and report back to parliament. Although skilful and powerful Ministers might learn how to be evasive about questions, and how to keep on good terms with the committee, they were seldom tempted to behave irresponsibly.

Some form of small-committee system is a natural development from a parliamentary system. The full assembly—ranging in size from more than six hundred in France to just over two hundred in Belgium and only one hundred in the Netherlands—is too big to scrutinize policy in detail. Every parliament therefore delegates detailed business to committees as a matter of course. The British House of Commons regularly appoints committees for this general purpose. But it is when these committees serve as direct watchdogs over the government that they become important. They do not serve this purpose in Britain.

#### Swedish Committee System

The Swedish committee system is of particular interest. The two Chambers, consisting of one hundred and fifty and two hundred and thirty members respectively, have equal powers but meet in full session only twice a week. They work in the main through eight standing committees, of which each Chamber nominates half the members. Each Chamber elects its share in proportion to the party strength in the Chamber and this, since one Chamber runs twice as long as the

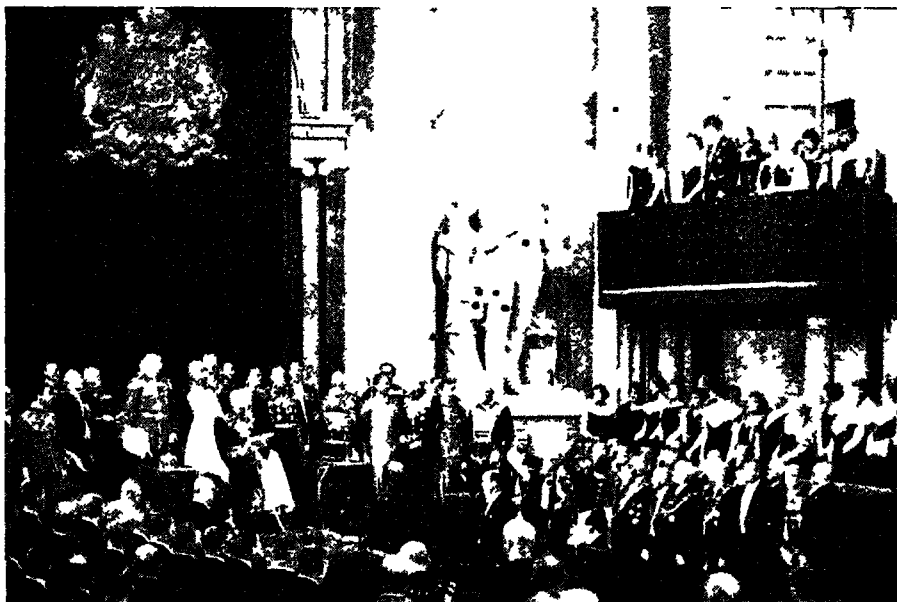
other without general elections, is not the same proportion in each Chamber. Thus the government may have to meet the attacks of committees in which the government parties have not a majority although any deadlock has to be resolved by a simple majority vote in a joint session of the Chambers. Then the more numerous Chamber, in which the government normally has a majority, tends to prevail. In this curious system, government measures may be obstructed in committee and outvoted in one Chamber, yet pass safely if the government demands a joint session. The effect is to moderate government policy and slow down its progress, yet evade ministerial instability or deadlock. The system could work only in a country as stabilized as Sweden.

#### Continental Party Divisions

The degree of parliamentary control over government depends, too, upon the strength of party organization. Strong party organization makes for strong governments less at the mercy of parliament unless the opposing parties are very equally balanced.

Continental parties tend, in general, to be not only more numerous and therefore smaller, but also less highly organized in country and parliament than British parties. Governments are therefore more at the mercy of parliamentary assemblies and committees. On the whole, the Left Wing parties tend to be better organized and able to act with more solidarity than the Right Wing, though exceptions naturally exist. The French Radical and Socialist Parties had a nation-wide network of local committees for electoral and propagandist purposes, although their central and national organization was less developed than the central authorities of British parties. French Centre and Right Wing groups which formed for the fighting of elections did not always remain groups inside parliament, and groups formed differently in Senate and Chamber.

The French party system was perhaps the most fluid of all continental systems but even Sweden normally has five or six important political parties, and Switzerland



#### SWEDISH PARLIAMENT OPENED

*The Swedish Parliament consists of two chambers with equal powers. They meet in full session only twice a week, most of their work being done by standing committees whose members are drawn from both chambers. Above is seen the ceremonial opening by the King.*

six or seven. Though the twenty or more splinters of the French party system were welded together on broad issues for general electoral purposes into a loose alignment of Right, Centre and Left, the absence of strong party organization tended to weaken the position of individual Ministers. It meant that Ministers had frequently no solid backing in debate, and, unless they owned a newspaper or belonged to one of the well-organized groups which owned newspapers, Ministers had little hope of explaining and defending their policy in the country. In this respect the Scandinavian countries are more akin to the British than to the French or Belgian models. Having fewer and more solid parties, they divide more sharply over policies than did the mosaic of confused groups with even more confusing labels which grew up in France.

So far it has been seen that democratic government involves finding how to make

parliaments responsible to the people, and governments responsible either to parliaments or directly to the people. Only by these means can we achieve what Abraham Lincoln called, in a famous phrase, "government of the people, by the people, for the people." But in modern highly industrialized countries, and especially in countries which are suffering from the social and economic upheavals of war, a further vital question arises. Can democratic ways of government be made to work in a society which is not stable, and which is deeply divided within itself? A democratic way of life requires a spirit of tolerance, compromise, give and take. Can democratic forms of government help to produce such a spirit where it does not already exist? Or are they only luxuries to be enjoyed by nations already happily stable and united? This is the most important problem that democrats in the modern world must always face.



Clearly, one great value of parliaments is that they help to reconcile differences of outlook and conflicts of social or economic interest. But on the other hand they cannot work at all unless there is some general agreement among the great majority of citizens that differences should be reconciled in this way. Divisions which cannot be bridged jar and jam both representative and responsible government. If one large party makes it its chief aim to attack and overthrow democratic institutions and laws, then citizens and parties who do believe in these things have to defend them and that means restricting the freedom of action of the anti-democrats. In other words, freedom can be greatest when there is already a broad and general agreement to make democratic institutions work smoothly and conversely, where freedom has to be restricted, democratic institutions cannot work smoothly.

#### Results of Instability

Instability usually finds expression in the growth of a large number of small and very quarrelsome parties, as existed in France during the Third Republic. Every government then has to be based on a coalition or grouping of several of these parties, because only so can it get the support of a majority in parliament. This means that government, too, is unstable, because it only needs one or two of these parties to desert the government for it to lose its parliamentary majority. That is why governments in countries like France and Belgium changed and reshuffled so often. In the seventy years of the Third Republic France had about a hundred different ministries, and about fifty different Prime Ministers. All that democrats can do in these conditions is to try to give the constitution some other sort of bias towards stability, which will offset and help to counteract this constant uncertainty and wavering.

One favourite device has been to give some particular section or sections of the community a greater weight in government than their numbers would strictly justify. This is done through a second house of parliament—usually elected in a different

way from the assembly which is elected by direct general elections—a Senate or Upper Chamber, which is given certain powers of law-making separate from the other house, or a share in law-making which, to some extent, checks the free action of the other house.

#### Formation of French Senate

The French Senate, for example, was at first designed to give extra power to the peasants in the villages and small country towns, in the hope that they would have certain solid interests and common opinions which would give stability to government. Every commune—whether it was a tiny hamlet or a large town—was given an equal share in electing Senators. Senators were elected indirectly—so that the communes only chose representatives who in turn chose the Senator for that area. And Senators had to be men over forty years old, so that the Senate was an assembly of middle-aged or elderly Frenchmen mainly representing agricultural interests and peasant opinions. Although after 1884 the towns were given more say than the villages, the Senate still represented mainly the smaller market towns.

Senators were elected for nine years at a time, Deputies for only four, so that Senators had much more security and continuity of office. The Senate had equal powers in law-making with the Chamber of Deputies which was directly elected on a simple basis of population, except that it could not, like the Chamber, initiate laws about finance. The government could be overthrown and its measures blocked by either house. So this device in France did not make for greater stability in government, as governments were often defeated in the Senate and were obliged to resign. M. Herriot did so in 1925, M. Blum in 1937 and again in 1938. Modern France is very divided in opinion about the value of a second chamber, but one has been established in the Fourth Republic. It is called the *Conseil de la République*, and is indirectly elected.

A conservative and deliberately weighted institution of this sort, despite the dangers of deadlock which it brings and the diffi-

culty of reconciling it with strict democratic theory has been much favoured by the other democracies of Europe. Its power and composition naturally vary enormously from country to country. Britain has her aristocratic House of Lords which is not elected at all, but has little constitutional power. Belgium has its Senate similar in composition and power to the French. Sweden has its first chamber, differing from its lower house only in being half the size and having double the life. Switzerland has its Council of States, already mentioned, which represents cantonal rights as distinct from the National Council which represents citizens by numerical population. Norway alone has one single assembly, though even that tends to split into two houses for certain special purposes. A second chamber often serves as a sort of supreme court and is given judicial tasks. Thus the French Senate could sit as a supreme court for the trial of the President of the Republic or of Ministers, should they commit offences against the State.

#### *Direct Appeal to Electors*

Another device for putting some brake on parliamentary irresponsibility in overthrowing governments too readily is to give the government, within limits, the power to have parliament dissolved before the end of its full term. This means giving the government some right to appeal direct to the electorate, over the head of parliament, and to seek popular support for its policy in new general elections. The Belgian King, like the British King, had the right to dissolve parliament at any time the Prime Minister asked and the President of the French Republic was also given this power, subject to the approval of the Senate. But this right was abused in 1877 and fell into disuse, which had far-reaching effects on the working of the Republic in France.

There is no better restraint on members of parliament, in their overthrowing of governments, than the threat that they will be confronted with the unpleasant prospect of fighting—and perhaps personally losing—new elections. But where

they have certainty of office for four years there is even some incentive to eject ministries in the hope of themselves getting office in a new coalition ministry. This frequently happened in France. Yet in both Sweden and Switzerland the government has no power to dissolve parliament, and parliament has a clear run of four years without any risk of general elections and it has in neither country shown any sign of overturning governments irresponsibly. One Swiss Minister even held office for as long as thirty-two years on end, and Swedish ministries are at least as stable as British.

#### *Tradition and Geography*

What generalization, then, can be made about the connexion between the stability of European governments and the various constitutional devices adopted to make them stable? At first sight, there might seem to be very little connexion at all. France, with a very conservative Senate and with legal power of dissolving parliament in the hands of the President, produced notoriously unstable governments yet Sweden and Switzerland, with only mild checks of this kind produce very stable government.

The truth is that constitutional devices matter less than the degree of natural solidarity which exists in the community itself. A nation which is fortunate in its geographical position and frontiers, like Sweden, Switzerland and the British Isles, which is small in size and compact in shape, and which has strong traditions of solidarity, tolerance, and willingness to compromise, such a nation can afford to be extremely democratic in its government giving wide powers to parliament and great freedom to its citizens. A country like France or Belgium, which is in a constant state of siege and in fear of invasion, which is more beset with social and economic problems and less automatically united over the basic form of its regime affords such freedom only at great risk. Democratic institutions are not transplantable, and their working depends on social conditions. The constant dilemma of democracy is that nations which most



#### FRENCH HIGH COURT OF JUSTICE

*A scene in the Palais du Luxembourg, Paris, of the High Court of Justice. The State is the source of French Justice. Since Napoleon's time French law has been highly codified.*

need its healing effects, and would benefit most from the reconciling influence of free discussion and parliamentary give and take, are the least likely to make democratic machinery work smoothly.

It would be wrong to deduce from this, however, that democratic government is a luxury only for nations already solid and united. The experience of France alone proves this. Between 1870 and 1875, when the Third Republic was set up, there was every chance and even great likelihood of France again becoming a monarchy. At times there was some risk of a dictatorship. The parliamentary Republic was at last evolved and accepted as "the form of government which divides us least," and most monarchists and the supporters of dictatorship came to look upon it as the best (even if only the second best) available in the circumstances. They wanted to equip it with several checks against the more Left Wing movements, to make it a very conservative Republic. They even

schemed to overthrow it, in time, in favour of monarchy, or dictatorship. But in spite of the recurrent crises and challenges which these minorities forced upon it from time to time, the Republic survived longer than any other French regime since 1789.

It is unlikely that dictatorship would have lasted nearly so long. The years between 1870 and 1940 were, for France, a time of great instability, deep division between parties and classes, and constant threat to national security from Germany. The Republic, born in one defeat—the defeat of France in the Franco-Prussian War—could not survive another defeat in 1940. But it did survive the ordeal of 1914-18, when France was a battlefield, and lost a million and a half men, whereas Bonapartist dictatorships, in 1815 and again in 1870, had plunged her into defeat. In other words, parliamentary government showed itself able to rally Frenchmen together in national solidarity better than dictatorship, and that remains

one of its greatest recommendations in the eyes of many French people

But once a nation has made this choice between democracy and dictatorship, the kind of democracy it evolves is determined by how strong a framework of law, order and authority it needs to hold together the forces tending to break its solidarity. The stronger these forces, the firmer must be the framework if democracy is to survive and work.

#### Government Administration

Hence the biggest problem of democracy is how to combine this strong framework and firm government with responsible government or—to put it another way—how to make government powerful and efficient, and yet keep it responsible to parliament. Elected assemblies such as parliaments can make laws and ventilate criticism, but they cannot themselves govern. There must be an executive power, united and vigorous in action, to carry out and enforce policies agreed by parliaments. In all European democracies this takes the form of a cabinet, or council of Ministers. These Ministers—the political heads of government—have at their disposal large staffs of trained experts in administration. The powers and attitude of these professional administrators—the civil service—are an extremely important part of the working of democratic government. Clearly, if they are the men who really govern, then all the apparatus of parliamentary elections and cabinets is a sham; but if they have not enough power or if they are inefficient or corrupt, the best kind of parliamentary institutions will not work properly.

#### Administration and Justice

It has been argued that the chief value of democratic forms of government is that they make and keep the government removable. Responsible government cannot be secured unless the people have some effective means of throwing out Ministers whose policy it dislikes. Cabinet Ministers and members of parliament change quite often; but the routine of government, on which the prosperity, welfare and happiness

of ordinary people so much depends, must go on. To see that it goes on—and is efficient is the chief job of the civil service. In all states, democracies and dictatorships alike the size and power of the civil service has tended to increase enormously during the last fifty years and more. How it is recruited, trained and organized, and what are its powers in relation to parliament and to the ordinary citizen, are all vital questions affecting the working of democratic government. An efficient civil service, with integrity and impartiality, was the greatest British invention of the nineteenth century. How did continental democracies tackle similar problems confronting them?

#### French Civil Service

Modern France inherited from Napoleon who in turn had partly inherited from the old monarchy of Louis XIV, a large and highly centralized system of administration and a great tradition of professional officialdom. Frenchmen think of officials (*fonctionnaires*) as including many classes of public servants who in Britain would not be included in this category such as soldiers, judges, local government employees, railway workers, schoolteachers and even university professors. This is because many of these activities of public life have in England normally been run by independent authorities and corporations (such as railway companies or universities) but in France they are branches of the State, run by government departments or under the direct control of government departments. Britain has no Ministry of Justice, as have most continental democracies, but only the Lord Chancellor's office. Only in very recent years has she acquired a Ministry of Transport and a Ministry of Education although, in common with her continental neighbours, she has set up many more such social-service departments as a result of the war and the needs of post-war reconstruction. Likewise local government authorities have in Britain grown up piecemeal on very ancient foundations, whereas in France they were mostly created afresh by the central government during the French Revolution.

This highly centralized system of administration in France (and in Belgium which as usual has closely followed France) has brought certain conflicts between the strong traditions of local community life and communal freedom which, as shown above, were the very origin of democracy, and the somewhat autocratic power of the prefects and the central authority. The prefect, who is the official responsible for administering each *département*, or main area of local government roughly corresponding to the British county, is government appointed, but the mayor of each commune, the smallest unit of local government, is locally elected. There has been recurrent tension between the two, and constant discussion as to the relative powers that each should wield.

#### Belgium, France and Sweden

In Belgium centralization has triumphed more than in France for the governor of each province is a government official, and so is the mayor or burgomaster of each commune. But the mayor is usually chosen from the local gentry or men of influence. This again reflects that sapping of local life which has come about with the growth of large towns and industrialization.

The departments of central government in France are directly under a Minister, as in Britain with the difference that the personal *cabinet*, or secretarial staff of the Minister, is more personal and less permanent than in Britain. A new Minister will surround himself in office with a small group of helpers and secretaries under his *chef de cabinet*. They will probably go out when he goes, and be replaced by the similar entourage of his successor in office.

Sweden makes a clear distinction between the status of officials within the nine state departments headed by a Minister, and the forty or more central government offices (post office, board of pensions and such-like) which are not under the direct control of Ministers. The latter are governed by permanent laws and regulations, and have a degree of independence rivaling British universities and Inns of Court. Civil servants of this kind are given fixed

legal status and rights. Despite the constant demand of civil servants in France for a statute conferring similar legal rights and privileges upon them, the most that was done was the development of a series of rules governing their terms of employment, promotion and pensions. Belgium has made more systematic provision for officials' rights.

In most democratic countries civil servants are barred from certain other rights such as active participation in party politics, or of course political office of any kind not compatible with their impartial performance of official duties. Here is another great difference between democratic government and single-party dictatorship. In Fascist Italy or Nazi Germany membership or affiliation with the ruling political party was a positive aid to promotion in the civil service. Like judges and magistrates, the civil servant in a democracy is encouraged to be honest, impartial and expert by offering good prospects of promotion and security of employment, and excluding him from political influences which would bias his conduct. They are mostly recruited on the methods devised by Britain during the nineteenth century—that is, by competitive examination at various levels of educational standard, lower grades coming from secondary schools and the highest from universities. But there is not, in France, an authority comparable to the unified power of the British Civil Service Commission, making itself responsible for the recruitment and usually the examination of all central government officials.

#### Civil Service and Trade Unions

A difficult problem in every democracy has been whether State employees should be allowed to form trade unions or professional associations enjoying the full freedom of other trade unions. It has usually been solved by allowing the formation of trade unions but restricting their right to strike, on the grounds that such right would not only jeopardize the whole machinery of law, order and public service, but would also present every official with a conflict of loyalties, to the State and

his union, which is irreconcilable. The obvious continental analogy is the position of the soldier—a citizen who has undertaken special obligations towards the State and the community which involve his surrendering certain rights enjoyed by the ordinary citizen. For him to strike would be mutiny, punishable by death; therefore it is not unreasonable to subject his civilian colleagues to similar discipline. The predominantly civilian tradition of a country like Britain lends itself less to the rigorous demands of continental democracy as regards civil servants' duties and obligations. Thus teachers of every grade have a wider professional freedom in Britain than in France.

#### Varying Legal Systems

This contrast between British and continental administration is in line with the broad contrast between their legal systems in general. Countries which inherited the more systematic and unified conceptions of Roman law, as did France, Belgium and Switzerland, proceed legally by more cut-and-dried methods. They seek to build up a complete civil code, such as the *Code Napoleon* which is still the basis of French law and justice and has been widely copied in Belgium. Countries which did not inherit Roman traditions, such as Britain and the Scandinavian lands, proceed more by customary and common-law methods. This basic difference finds reflection in many ways—as for instance the preference for written and documentary constitutions and formal Declarations of Rights in France and Belgium. (It must be remembered, however, that the United States combines a written constitution and a Declaration of Rights with a legal system directly borrowed from English common law.) These differing backgrounds of tradition and outlook colour the working of representative and responsible government.

The source of justice in England is the King. In France and Switzerland, the State. Whereas the English common law grew up mainly by the absorption of all jurisdiction into the royal courts, continental law has frequently been unified at a late

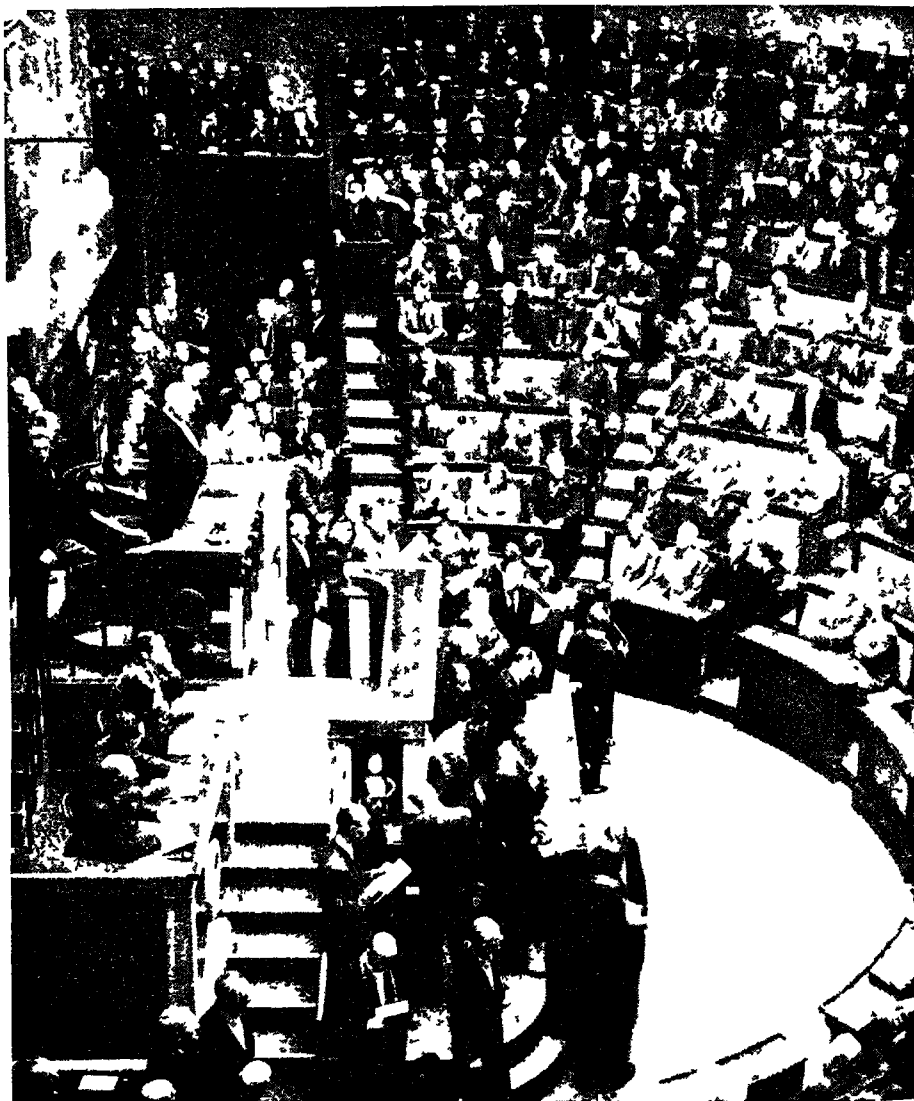
stage in its growth by deliberate codification, carried out by a great law-giver such as Napoleon.

But whatever the procedure, the ultimate principle maintained by all democratic government is "the rule of law," as defined in legislation, government regulations and judicial precedents. As explained in a previous chapter, the principle of "the rule of law" is essential to the democratic notion of justice. How is this principle maintained in France?

The authority at the head of both justice and administration in France is the *Conseil d'Etat*, or Council of State. Napoleon adapted this body from the old King's Council of the years before the French Revolution and he made it a powerful weapon of despotism. But in the hands of democratic governments, it became something very different. It came to be composed partly of judges, and partly of professional administrators. It is the chief source of that administrative law (*droit administratif*) which has been discussed elsewhere in this book. Unlike English common law, French law makes a clear distinction between disputes between individual citizens, and disputes in which a governmental authority (a municipality or a government department) is concerned. Disputes of the latter type in France come before special courts, which are peculiarly fitted to deal with claims of the individual against the State. They have judges who, under the Republic, were completely independent, but they also have what British common-law courts have not—administrative experience.

#### Citizen Versus State

Administrative law and administrative courts are concerned as much as ordinary courts with maintaining "the rule of law"; they seek to do it in ways different from the British, which are not necessarily inferior ways. At the present time, when governments take an ever-increasing part in social and economic life, and when many great industries have been nationalized in the Western European democracies, the number of such disputes between the citizen and the State increases. Continental



democracies are perhaps better fitted in their judicial systems to deal with this change than is Britain

#### The Pattern of Democracy in Europe

The pattern of democratic government in Europe is one of unity in diversity. Western European nations have a common heritage of democratic ideas and institu-

tions just as they have a common heritage of law, culture and civilization. This inheritance comes partly from far distant fights for personal freedom and national independence, as in Scandinavia and Switzerland, partly from the great French Revolution and the tide of democracy to which it gave rise, partly from the living example of British representative parlia-



#### FRENCH CONSTITUENT ASSEMBLY

*A meeting of the French Constituent Assembly at the Chamber of Deputies in Paris. The oldest member of the Assembly delivers a speech.*

for individual human personality, and a resolve to provide the circumstances and environment in which the ordinary citizen can live secure in his legal rights, immune from violence and from punishment for actions which are not offences in the eyes of the law, and free to exercise his citizen rights within an agreed framework of parliamentary, responsible government. Yet there are many roads which lead to this common goal; and forms of government which serve one nation well may be inappropriate in another.

#### Local Authorities' Powers

In no way do they vary more than in the amount of power they contrive to give the central government as compared with local authorities.

At one extreme stands Switzerland, a federal constitution in which the little canton is the real unit of government, and central government is confined to the tasks of looking after national defence, foreign affairs, commercial policy, and common business such as currency and national taxation. Although federal powers have tended to increase in modern times, the cantons still keep control of education, church organization, direct taxation and justice. Within this democratic framework people speaking four different languages and holding to two different religions live a free and prosperous life.

At the other extreme is France, a highly unified State in which there is more local administration than local self-government, save in the commune, which controls local police, local taxation, and all municipal social services. The chief officials of departmental administration, the prefects and sub-prefects, are immensely powerful agents of the central government and local differences have been greatly ironed out by the common civil code, the unified judicial and administrative system, and a national system of extremely unified educa-

mentary government and administration. The diversity of constitutions and customs comes partly from the variegated interweaving of these different strands, and partly from adaptation to each nation's particular needs and outlook.

And it is as important to see the unity as it is to understand the diversity. Behind the different forms lie a common respect



tion Between these two extremes range many varieties of centralization and decentralization. Scandinavia's traditions of vigorous local self-help and Belgium's traditions of strong leadership and integration pull these countries in opposite directions, and result in a quite different balance between local and central authorities.

This pattern has been affected in detail, but not in general shape, by the Second World War. Sweden and Switzerland, which remained neutrals throughout, were profoundly affected economically, but very little politically. Other countries, such as the Netherlands and Norway, were slightly affected politically, and have resumed political systems which are a direct continuation of their pre-war regimes. Others, particularly France and Belgium, have undergone profound political upheaval as well as social and economic disorganization.

#### French Political Difficulties

In all of them, as after the Empire of Napoleon more than a century before, national spirit has been stimulated and is likely to take new and more dynamic forms. All were confronted after liberation with broadly similar economic problems of reconstruction, and in all of them the movements which had engaged in resistance during occupation assumed political importance after Germany's defeat. It may be that one consequence of war will be to strengthen the unity of the democratic pattern in Europe, and to blur some of the diversity. Nationalization of the main means of production was a common feature of Western countries during the period of reconstruction. This must, in time, have far-reaching effects on the methods and problems of parliamentary government.

France found greater unanimity for rejection of the Third Republic than for the formation of the Fourth, and more than a year after liberation the shape of the new constitution was still a subject for party dispute. A referendum held in 1945 decisively rejected a simple reversion to the Third Republic, and a second referendum held the following year equally rejected the draft of a new constitution

prepared by the first Constituent Assembly.

Only after further general elections to a second Constituent Assembly, and a third referendum on a new draft prepared by it, was the shape of the Fourth Republic defined. In October, 1946, the electorate decided, by a majority of one million two hundred thousand votes and despite General de Gaulle's campaign for the adoption of a presidential form of government not unlike the American, to retain a form of parliamentary government which bore more resemblance to the Third Republic than any other proposal. Though incomplete, since the electoral law based on proportional representation was not included in the text submitted to referendum, and the powers of the second Chamber were left only partially defined, it was clear that the last word still lay with the elected lower house, now called the National Assembly. The President of the Republic was now to have greater powers, on paper, than his predecessors of the Third Republic but how much greater they would be in practice would necessarily depend on the personality of the early Presidents and the working of the party system.

#### Keeping the Balance

It was clear from the first that parliamentary government would work differently in future, because of the emergence of a few very strong and fairly equally balanced parties—the Communists, Socialists and Catholic Democrats. General anxiety to get away from the old unstable multiplicity of groups was mingled with fears of a new dictatorship of the party bosses and party machines, and the system of proportional representation enhanced the power of the party organizations. Furthermore, political parties now operated on a new social basis. The French nation was seeking a new balance between industry and agriculture with increased attention devoted to industrial development and more extensive nationalization of the big concerns.

As in other countries which had endured German occupation, the younger generation grew to adolescence in conditions which bred impatience with older tradi-

tions, habits of vigorous self-help, a passionate hatred for tyranny and aspirations for a better social order, and some hostility to the slow and compromising methods of parliamentary government. The spirit of resistance was a restless, youthful force, with all the idealism and much of the violence of youthful politics. To this spirit, in all European countries, the democratic ideal which held most appeal was the French Jacobin ideal of the "sovereignty of the people" rather than the British ideal of "the rule of law." In this respect, again, France has tended to set the pace and the example for other countries: though in her fidelity to parliamentary government, more akin to the British model than to the American, she remained peculiarly attached to her own republican traditions as they had been cherished in the Third Republic.

The most widespread demand in Western countries after the Second World War was for "economic democracy" and "a more social democracy." That sense of the inadequacy of merely political democracy, which was mentioned at the beginning of

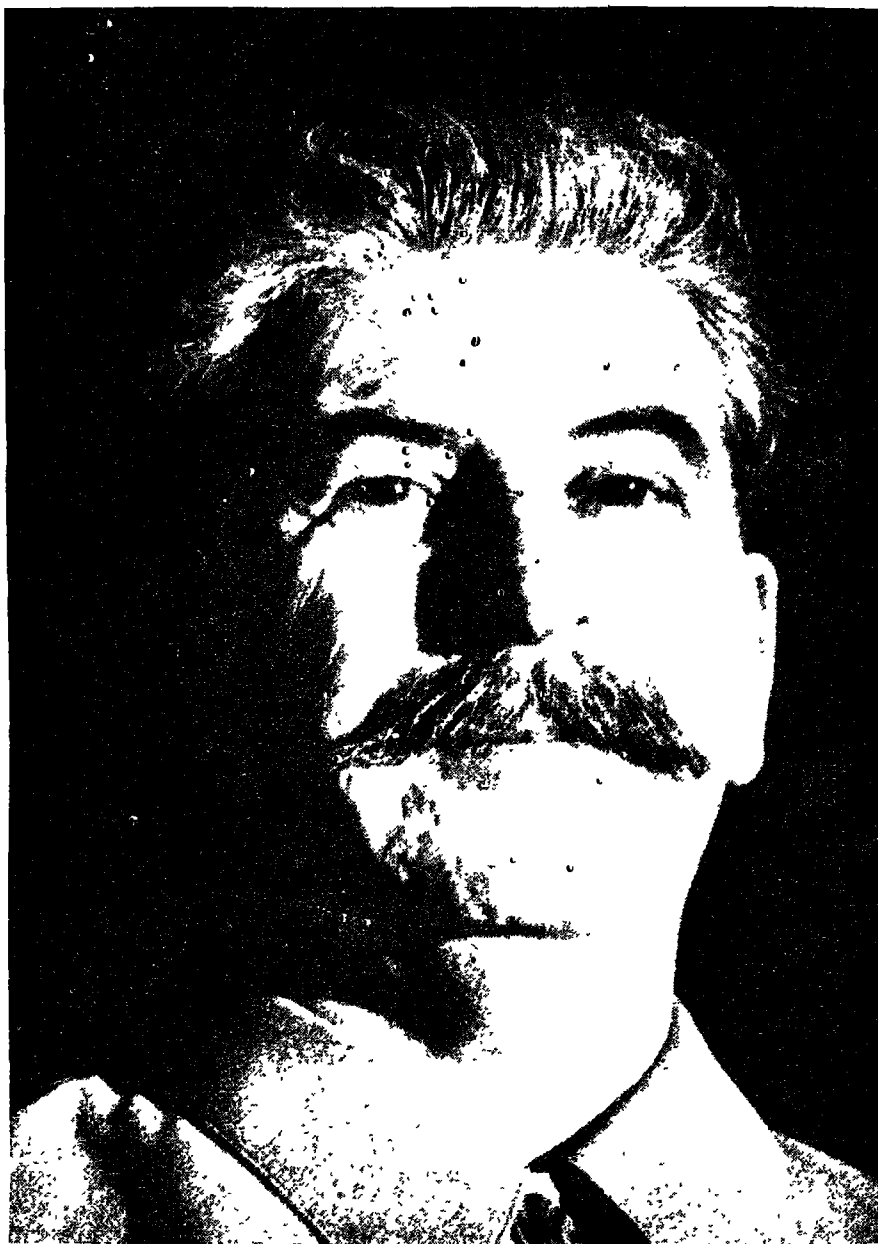
this chapter, became particularly acute. The accomplishments of Soviet Russia deeply impressed the peoples of Europe, and active Communist parties existed in all democratic States. The modern challenge to democracy is that it should be more democratic—extending the ideals of freedom, equality, fraternity, and "sovereignty of the people" far beyond the realm of politics into social and economic life. There is a general demand that the "social security" of the ordinary citizen at every stage of his life "from the cradle to the grave" should become the concern of the State. The power of big trusts and corporations in industry, trade and finance is mistrusted as being incompatible with social and economic democracy.

Despite the many difficulties and challenges confronting the western nations of Europe a new vista of democratic law and government in Europe was opened up by the war. Modern democracy is not the last phase of an old and dying creed: it is only the latest stage in the development, extension and practice of democratic ideas and ideals.

### Test Yourself

1. Outline the structure of government in Switzerland.
2. What is an *interpellation* in French parliamentary practice?
3. How did a parliamentary committee under the Third French Republic differ from a committee under the British parliamentary system?
4. Why is strong party organization desirable in the interests of stable government?
5. Mention one respect in which the constitution of Norway is unique among the western democracies.
6. What are the functions of the French Council of State?
7. Name three main historical sources of the democratic tradition in western Europe.
8. How would you express shortly the fundamental difference between the British and the French democratic ideals?
9. Mention one of the main general effects that the recent war seems to have produced in the outlook for democracy.

*Answers will be found at the end of the book*



#### LEADER OF THE RUSSIAN PEOPLE

*Joseph Stalin, President of the Council of People's Ministries and Generalissimo of the Soviet Union, is the subject of unparalleled devotion from the Soviet peoples.*

# LAW AND GOVERNMENT IN THE U.S.S.R.

THE study of the political institutions of Soviet Russia presents certain very considerable difficulties to the inquirer whose ideas about government have been cast in a Western mould. It is as well to be clear from the outset what these difficulties are. From one aspect it is a matter of terminology. As recent international transactions have clearly shown many of the political terms in current use—some of them with histories going back to classical times—have acquired new specific meanings when employed by Soviet writers and speakers. These meanings are not the same as those which the words in question bear in a Western setting. To frame our questions about the Soviet Union in terms of 'more or less democracy' or 'more or less freedom' is to court disaster. But the difficulty of terminology is only a superficial aspect of the main problem which is how in fact to apprehend and describe a political organization whose scope, purposes and internal structure are alike unique in history. The physical peculiarities of the Soviet Union—its continental extent and the many racial origins, dialects and customs of its peoples—are secondary to these fundamental differences of spirit and function.

There are two ways by which we may approach our task, the analytical and the historical. The former leads immediately to one obvious but dominating consideration. Western political thought has normally had to deal with two separate concepts—society and the State. The former covers in normal times most of the activities of the ordinary citizen—the way he earns a living and the cultural or recreational use of his leisure. These activities have ordinarily been carried on either by the citizen individually or by some association, inherited or voluntary. Against this, the State has appeared as

something outside and even alien entrusted with the most vital common concerns of the community but interfering in its ordinary life only in order to control or regulate. History has shown many variations in the extent of State intervention in different societies, and political theory is largely concerned with the relations between the two concepts. But in the case of the Soviet Union, this dualism appears at first sight almost non-existent. What we see or seem to see in the Soviet Union is a State which has absorbed all, or almost all, the functions of society. The functions of control and regulation are secondary to those which direct the production and distribution of wealth (to these ends apportioning individual energies), and which determine or attempt to determine the whole course of social and intellectual evolution. Neither as producer nor as consumer, neither at work nor at play, does the Soviet citizen appear to be acting in any way but as a unit in the Soviet State.

## Effect of the Russian Revolution

In view of the fact that the tendency in many parts of the world has for some time past been towards an increase in the scope of the State's activities, it is tempting to let the matter rest there and to regard the Soviet system as merely an extreme case of this development. One would then ascribe all its peculiarities to the fact that the State in Soviet Russia undertakes so many more functions than do other States with which we are acquainted. But such a conclusion would be inadequate. For a full understanding, the historical approach is essential.

The Russian Revolution the third of the great revolutions of the modern world, differed from its two predecessors, the American and the French in the complete-

ness of the breach which it made between the old and the new order of things. Although a good deal of the administrative lay-out of the Tsarist State was perforce taken over by the Bolsheviks, the fundamental institutions of the Soviet Union owe nothing directly to those of Imperial Russia. The prehistory of the Soviet system of government is not to be found in the constitutional history of Russian Tsardom, but in the development of socialist theory from Marx to Lenin. It is scarcely a paradox to say that the Soviet Union is the product of an historical accident—the fact that the collapse of the Russian Empire took place at such a time and in such a way that power in Russia could be seized by the bearers of an international revolutionary doctrine of no specific relevance to Russia itself.

There is the further fact, that for reasons largely external to Russia, the opponents of this doctrine, while strong enough to prevent it from making further conquests in the period after the First World War, were not strong enough to crush the revolution in Russia itself. The task of the rulers of the Soviet Union for a quarter of a century has been one of harmonizing a rigid and largely unchangeable social philosophy with the physical circumstances of a domain which was substantially the old Russian Empire, shorn of its Western fringe.

#### Rulers' Strength of Conviction

Two facts help to explain their success. Their belief in the historical necessity of the Marxist-Leninist philosophy gave the Soviet rulers the strength and the ruthlessness required to force the people to undergo immeasurable hardships and make great sacrifices for the sake of an ultimate objective not of their own choosing. The strength of their doctrinal convictions enabled the Soviet rulers to practise temporary expedients of such latitude that time and again outside observers have wrongly suspected them of being about to abandon the doctrine itself. It is true of course, that some freedom of interpretation of the doctrine has been permitted so that today the official philosophy of the Soviet Union is better described as Marxism-Leninism-Stalinism.

It is this flexibility in action which provides the chief obstacle in the way of giving a completely coherent and absolutely valid survey of Soviet institutions. The victory over Nazi Germany, the increased territory and growing political influence of the Soviet Union seem likely to inaugurate a new era in its already chequered history. But nothing that has happened so far gives real ground for believing that the period of experiment and change is at an end. There is no reason why what we today describe as Soviet institutions should not be abandoned tomorrow, if the Soviet rulers believe that some other machinery would be more suited to the new stage in their labours. For it must be remembered that the Marxist-Leninist doctrine is an evolutionary one and is not the foundation for a particular system of government.

#### Communist View of the State

The Marxist-Leninist theory of the State was based upon a survey of the capitalist State, which is regarded as the organ by which the possessing classes under capitalism forcibly retain their hold. The goal of the proletarian revolution is the classless communist society. In such a society where universal abundance would ensure that there were no inequalities to preserve the State would lose its principal functions: those of coercion, and so wither away. In this scheme, the fully communist society is preceded by a transitional socialist phase. It is this phase which the Soviet Union claims to have reached. Whereas under full communism, the community's income will be distributed according to need, under socialism, wealth, while already communally produced, is distributed according to work done and not according to need. As Article 12 of the U S S R Constitution of 1936 puts it: "In the U S S R, the principle of socialism is realized. From each according to his ability, to each according to the work performed." Molotov, in introducing the third Five Year Plan to the Russian Communist Party Congress in March, 1939, described it as a programme for a gradual transition from socialism to communism.

But even at the socialist stage, it was

originally held that the coercive element of the State (such as the police and the law courts) would begin to decline and the State's functions become purely technical—dealing with things rather than with persons and so simple as not to require anything in the nature of a special political or administrative personnel. But before this state of affairs could come about, it would be necessary to have dissolved those institutions which came into existence with the Revolution and which were to remain in being until it was fully accomplished. These institutions are the vehicle for the dictatorship of the proletariat, since it is the proletariat which has overthrown the capitalist order and must exercise a dictatorship so long as there exist other classes who might stage a counter-revolution.

Since the Soviet Union now claims to have reached socialism and the classless society, the survival of an apparatus of coercion is justified by the existence of external enemies of the Soviet Union—a circumstance not foreseen when the doctrine was formulated, since it was believed that socialism would either be world-wide or would perish. It was in this sense that Stalin, in March, 1939, answered critics who complained that in the Soviet Union the State was not "withering away."

From the theoretical point of view, the Soviet institutions of today are the embodiment at once of the socialist form of society and, therefore, truly *democratic* (in the Soviet sense)—and of the *dictatorship* of the proletariat. The anomaly is more apparent to Western than to Soviet eyes.

It is, therefore, not the apparatus of economic planning and organization which should be regarded as peculiar (from the historical and theoretical point of view), but the existence of what are elsewhere regarded as the normal components of a State—a bureaucracy, courts of law, an army and police force. In Russia, these exist not as the instruments of the community but of the purposes of a group within the community.

This group (the Soviet leaders) has as its purpose the introduction of communism and has its own institution, the Communist Party (of Bolsheviks). This is the most



#### PEASANTS SPEAK WITH LENIN

*Lenin was undistinguished in appearance and easy of approach to peasants and workmen. He practised what he preached as a Communist—was patient and willing to explain. The sketch is a contemporary one.*

important of Soviet institutions and the only one whose history goes back beyond the Revolution itself. After serving as the means by which power was seized, it has acted in the name of the dictatorship of the proletariat—itself an unembodied myth. Furthermore, until the dissolution of the Third (Communist) International in May, 1943, the Russian Communist Party was the dominant partner in an international institution still theoretically engaged in active promotion of the original international communist idea. Within the Soviet Union, the decisions that count are the decisions of the party. In regard to the making of policy indeed, the system can best be understood by an application of Bagehot's famous differentiation—the Supreme Soviet and the other organs of the State are the dignified parts of the Constitution; the efficient part is the Communist Party.

"The new Constitution," said Stalin in

# STATE and PARTY



SUPREME SOVIET  
(SOVIET OF THE UNION AND SOVIET OF NATIONALITIES)

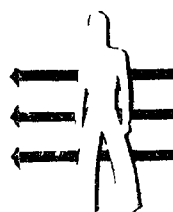
PRAESIDIUM

COUNCIL OF MINISTERS

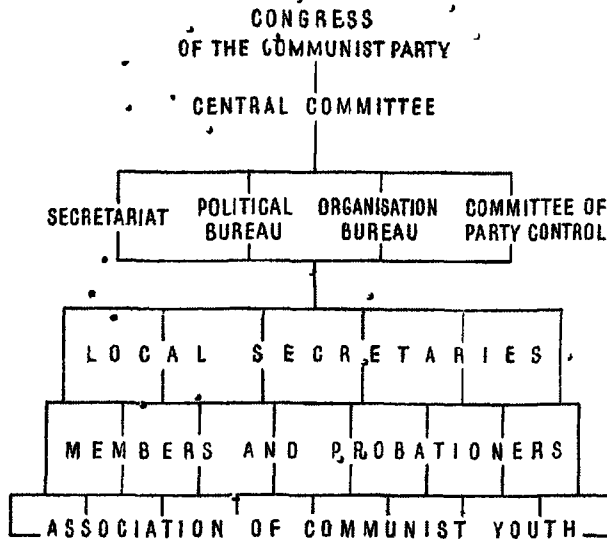
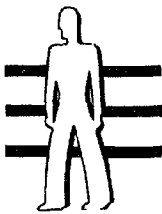
COMMISSIONS AND  
STATE INSTITUTIONS

UNION  
MINISTRIES

UNION-REPUBLICAN  
MINISTRIES



*While membership of the governing bodies (on the left) is theoretically open*



*to all, in practice all important posts are filled by Communist Party members*



November, 1936, "does preserve the regime of the dictatorship of the working-class, just as it preserves unchanged the present leading position of the Communist Party."

Stalin's remark is the best clue to the understanding of the Constitution. No constitution is ever, of course, a wholly neutral document. It is plain that the Founding Fathers were not oblivious of the interests of particular classes in the American nation of 1787, but the American Constitution is nevertheless neutral enough, to have worked, and worked tolerably well, under the far different conditions of later periods. It is, in fact, a permanent instrument of government available to whatever group may wield political power through its ability to command the support of the electorate. The Soviet Constitution, on the other hand is designed solely as the instrument of Communist Party government and without the Communist Party would be quite meaningless.

### The Soviet

The domination of the Communist Party is the most important but not the only example of those persistent traits which are, in the Soviet Union, more important than the institutions themselves. Four more of these deserve particular attention.

In the first place, as a corollary of the whole Soviet theory of government little part is played in Soviet practice by the principle of the separation of powers, between legislature, executive and judiciary. The root institution remains the soviet or council, an undifferentiated elected body, embodying the group will of its particular electorate. It was the soviets of workers, peasants and soldiers, represented in a Congress of Soviets, who under Bolshevik leadership conducted the revolution of November 1917. The first constitution of the Soviet pattern, that of the R S F S R (the Russian Socialist Federal Soviet Republic) of June, 1918, embodied the principle of indirect election with the individual soviet at the base of the structure. A similar pyramidal form characterized the first Union constitution of July 1923. The Constitution of 1936 reflected the increasing differentiation within the governmental

structure which stability had brought about, and made a formal distribution of function between the various organs of the State.

But tradition was too strong, the differentiation of function remained formal rather than fundamental and is not generally observed.

Since the system does not, of course exist in order to define and to defend the rights of individuals—the historic root of Western constitutionalism—there is indeed no reason other than convenience or propaganda why the separation of powers should find a place in the Soviet scheme.

### Federalism in Russia

The second characteristic is the nominal element of federalism which existed within the original Russian Soviet Republic and which forms the link between the Republics of the Soviet Union, of which the Russian is the largest and most important, as well as permitting an apparent autonomy for much smaller units. Indeed, the federalist solution of the problem of national minorities within the Soviet Union is in a sense a by-product of the Soviet scheme of regional and local government. This Soviet federalism bears, however, little resemblance to the federalism of the United States, of Canada or of Switzerland, to take three successful and different examples of the Western form of the doctrine. It is the product of the temporary exigencies of the revolutionary period, when the discontents of oppressed nationalities reinforced the discontents of under-privileged social classes. It does not spring from Marxist-Leninist theory, which is centralist and anti-federal in character.

In spite of the room for a limited measure of independent cultural activity on the part of the non-Russian nationalities which it gives, Soviet federalism is in practice so limited as to be scarcely recognizable as an example of the federal species. Its persistence has, however, enabled the Soviet Union to retain its original character of a nucleus of a wider international communist grouping, and it has provided the means by which new territories can be absorbed without apparent imperialism, and without drastic constitutional changes.

The explanation of the paradox of centralized authority within a federal form is to be found in the third persistent trait of Soviet constitutional life—the principle of dual federalism. According to this conception, each institution or organ of a subordinate federal unit of whatever size (including the Union Republics) is usually responsible not only to its own constituents but also to the corresponding institution or organ of the unit immediately above it. Together with the fact that the All-Union Communist Party is a unitary body, although including the separate parties of the Union Republics, this principle makes central control complete.

The fourth trait (whose emergence in countries within the Soviet Union's sphere of influence is the characteristic symptom of the spread of Soviet ideas and practices) is the formal unanimity of all decisions. From 1920 onwards the communists were strong enough to dispense with the assistance of other revolutionary parties, whose legal existence ceased, and henceforth all elected bodies of whatever size and importance were composed partly of party members and partly of so-called non-party men (later often called in admiration non-party Bolsheviks) who owed their position likewise to communist patronage. These bodies invariably take the decisions which the appropriate party organ has recommended beforehand and unanimity of voting is a foregone conclusion. The fact that the Supreme Soviet always votes unanimously would seem to render idle the provision requiring a two-thirds majority for constitutional amendments.

#### Importance of Criticism

Inside the party, unanimity took longer to arrive owing to the divergence of doctrine and clashes of personality dividing Stalin from his early rival for Bolshevik leadership, Leon Trotsky, and from some of the latter's associates. But since 1927 (when Trotsky was expelled from political life), party conflicts have always been settled within the hierarchy in advance of formal ratification, and Party Congresses and lesser gatherings have always voted unanimously as far as public decisions are con-

cerned. This unanimity is the best evidence for the rigorous nature of central control in spite of the formal basis of State and party in mass consent. Expressions of criticism about the conduct of State or party affairs have normally indicated either that a change of policy is forthcoming or that some particular office-holder is marked for dismissal. Soviet criticism is a form of advance publicity for the Soviet government's next step.

The representative and deliberative institutions of the State belong then to the dignified part of the Constitution. They exist to ratify and to give moral authority to decisions already taken and are a means by which the rulers communicate with the ruled rather than the reverse.

#### Delegation of Powers

This has made possible the two most obvious features of the institutions themselves. First, they are so large and meet so rarely that they would be quite unsuitable for the transaction of any but formal business. Second, and as a result of this, they practise the delegation of powers to lesser bodies emanating from them on the widest imaginable scale. Under the Constitution of 1923, the Congress of Soviets, a body of over 2,000 members, delegated its authority in the long intervals between its meetings to its Central Executive Committee. But this body, which consisted of about 600 members, also became formal in its functions and was itself replaced for most of the time by a standing committee known as the Praesidium. This found its functions—even its legislative functions—trespassed upon by what was properly an executive body of departmental chiefs, the Council of People's Commissars (*Sovnarkom*), renamed the Council of Ministers in 1946. Under the 1936 Constitution the Central Executive Committee, the intermediate body between the Congress of Soviets and the Praesidium, was dispensed with altogether. A similar process of delegation exists in the constitutions of the separate Republics and in the functioning of the City Soviets.

In the case of the party, the Party Congress, a body of over a thousand strong,



FROM THE DISTANT LANDS OF THE SOVIET PEOPLES

*The Council of Nationalities meets among the splendours of the Grand Kremlin Palace, Moscow. Left to right are the delegates from Kazakhstan, Dagestan and Kirghizia.*

elects a Central Committee of about seventy members with about an equal number of non-voting alternates or substitutes. Since the more recent congresses (those of 1930, 1934 and 1939) have been separated by such considerable intervals, the Central Committee may be regarded as the main organ of the party.

#### Constitution of 1936

It is with these fundamental characteristics in mind that the Constitution of 1936 should be studied. From its opening articles we learn that the U.S.S.R. is 'a socialist state of workers and peasants' and that its political foundation is "the Soviets of Toilers' Deputies, which developed and grew strong as a result of the overthrow of the power of the landlords and capitalists and the achievement of the dictatorship of the proletariat." Socialist property is found either in the form of State property or in the form of the property of the collective farms and co-operative associations. (Outside agriculture the co-operative form of organization has become largely restricted to the sphere of retail trade, in spite of encouragement to producers co-operatives to expand during the post war period when goods were very short.) The law "permits" the small private economy of individual peasants (a rapidly disappearing class at least up to 1941) and of artisans not employing labour. It "protects" the rights of citizens to personal property to their income from work and to their savings and in the right of inheritance. The economic life of the country 'is determined and directed by the State plan of national economy'.

The articles dealing with the organization of the State begin with the thirteenth, which lists the Soviet Socialist Republics making up the Union. Since the territorial acquisitions of 1940, these have numbered sixteen. The division of jurisdiction between the Union and the Republics is covered by a list of the subjects under the authority of the Union's highest organs. This Article (14) is thus comparable with Section VIII of Article I, Sections II and III of Article 2, and Article 3 of the Constitution of the U.S.A. The Soviet list has in common with

the American list those matters which relate to the external affairs, internal security, and defence of the Union, but it goes far beyond these and includes within the Union sphere almost all the attributes of government, either directly or indirectly. Thus the Union conducts the foreign trade of the country on the basis of the State monopoly, determines the plan of national economy, conducts all economic enterprises of 'all-Union importance,' and administers transport and communications. It ratifies the single State budget of the U.S.S.R. as well as the taxes and receipts which go to the Union, republican and local budgets, directing the monetary and credit systems, organizing State insurance, contracting and granting loans and enforcing a uniform system of national economic accounting. It is responsible for the legislation governing the judicial system and its procedure for the criminal and civil codes, for laws governing citizenship and the status of foreigners, for all-Union acts of amnesty arising out of Union law, and for the establishment of principles of legislation on marriage and the family.

The sovereignty of the Union Republics is restricted not by specific prohibitions but by the obligation upon them to respect the provisions of Article 14. By Article 16, the individual constitutions of the Republics have to be drawn up in conformity with that of the U.S.S.R., while taking into account the specific features of each Republic. In all cases of conflict of laws, the laws of the Union prevail. By amendments passed by the Supreme Soviet in February, 1944, the Republics may enter into direct relations with foreign states and shall have their own Republican military formations. Two Republics, the Ukraine and White Russia, have been admitted to separate representation in the United Nations Organization.

#### Rights of the Union Republics

The Union Republics have two formal rights which appear on the surface to be noteworthy. The territory of each Republic cannot be altered without its own consent and, more unusual, each Republic has the right of secession. This right was com-

mented upon by Stalin in his speech introducing the new Constitution in November 1936. He there explained that the right of secession was the primary feature distinguishing the Union Republics from the Autonomous Republics which have a measure of self-government within them. Stalin said that all Union Republics would have to fulfil the conditions necessary to make the right of secession more than a meaningless scrap of paper. These conditions were that such a Republic should not be wholly surrounded by other Soviet territory, that it should contain a more or less compact majority of a given nationality and should be large and strong enough not to be immediately swallowed up by a foreign power. None of the Republics, declared Stalin, would of course actually raise the question of seceding from the U.S.S.R. This belief had a sound basis in political fact and in the actual structure of the Union. The Constitution gives no indication of how a Union Republic could take over the vast number of functions essential to its existence which are carried on by organs of the Union government. The domination of the unitary party and past designation of all nationalist movements as treasonable suggests that no such problem will ever arise.

#### National Minorities

Articles 22 to 29 further divide the Union Republics into lesser political units. Changes in this direction have been very frequent and it is difficult to be absolutely up to date on the territorial administrative structure. In 1947 there were (in addition to the sixteen Union Republics), sixteen Autonomous Soviet Socialist Republics (twelve of which were in the R.S.F.S.R.). Provision for the rights of national minorities also existed in the form of nine Autonomous Provinces (*oblast*) and ten National, or Autonomous, Districts (*okrug*). The ordinary division is the province (*oblast*), of which there were then 119. In the R.S.F.S.R., some of the provinces are grouped into larger units—territories (*krai*). The creation and abolition of subordinate units appear to be wholly a matter for the central authorities. In September

1941, for instance, the Volga German Autonomous Republic was dissolved and its entire population transported to Siberia and Central Asia. The Kalmuck, Crimean and Checheno-Ingush Autonomous Republics have also been dissolved.

The constitutions of the Autonomous Republics are defined by Articles 89 to 93 of the Union Constitution and resemble those of the Union Republics. In the territory (*krai*), the province (*oblast*), the district (*okrug*), the area (*rayon*) and in the city, the village and the hamlet, the corresponding soviet is also the basic authority. There are about 70,000 of these primary units. About one and a quarter million Soviet citizens are members of "soviets—one-third of them being women. In accordance, therefore, with the principle of dual subordination, the executive committees of the soviets of territories below the rank of Autonomous Republic are accountable to the executive committees of the soviet of the next larger division within which they are included.

#### Supreme Soviets

The nature of the Federation is further illustrated by the respective organization of the governing organs of the Union itself and of its sixteen constituent republics. The Supreme Soviets of the latter are elected for a four-year term, to exercise the legislative functions prescribed by the Constitution and to elect their praesidia and their executives—Councils of Ministers (formerly called Councils of People's Commissars).

The Supreme Soviet of the Union, as a federal body, is naturally more complicated in structure. It embodies the same principle as that of the United States Congress—direct representation in one house, "the Soviet of the Union," on a basis of approximately equal electoral districts in the ratio of one deputy to each 300,000 people and representation of the units of the Federation in the other house, irrespective of the size of the units. The units represented are not merely the Union Republics but all the subdivisions which have a basis in nationality—its functions being defined in its title, the Soviet of Nationalities. Each Union



BALLOT BOX IN A NEW SETTING

*Many and picturesque are the nationalities in the Soviet Union. For these voters in Tashkent the ballot box has been upholstered in gorgeous cloths and the magnificent wall coverings have banished the usual austerity of the polling booth.*

Republic sends twenty five deputies, each Autonomous Republic eleven each Autonomous Province five and each National District one. The election of 1946 produced a Soviet of the Union of 682 members (of whom 116 were women) and a Soviet of Nationalities of 657 members. The two chambers have equal powers and there is a provision for a dissolution and new elections in the event of an irreconcilable difference arising between them. In default of a dissolution by the Praesidium elected by the two houses in joint session the Supreme Soviet is elected for four years and is to be convened twice a year, provision being also made for extraordinary sessions if necessary.

An idea of the way in which the institution is intended to function normally can be found in the verbatim report of the second

regular session that of 10-21 August 1938. The English translation of this document fills a stout volume of nearly 700 pages. The Soviet of the Union devoted three days to the consideration of the Budget after which its successive clauses were each passed unanimously and without any abstentions. A two day debate followed on draft regulations proposed for the judicial system of the USSR and of the Union and Autonomous Republics. Various amendments were moved and were unanimously adopted. A bill with regard to citizenship of the USSR was then adopted after the only amendment proposed had been unanimously accepted. Meanwhile the session of the Soviet of Nationalities had been pursuing a similar course. At the seventh sitting of the Soviet of the Union, the People's Commissar for

Justice reported that some of the amendments made by the Soviet of Nationalities to the Judicial System Act had resulted in a different formulation of certain clauses from that adopted by the Soviet of the Union. He moved on behalf of the Government that the texts of the Soviet of Nationalities be accepted, and this was agreed to.

In addition to the eight separate sittings of each house, five joint sittings were held. These passed the Budget, the Citizenship Act, a law on the judicial system, an Act clarifying the power of the Praesidium under Article 49 of the Constitution dealing with the denunciation and ratification of international treaties, an act imposing a special tax on the horses of individual (non-collectivized) peasants, which had been debated in the Soviet of Nationalities and the Soviet of the Union, and an Act relating to the holding of an Agricultural Exhibition. It also amended Articles 22 and 23 of the Constitution by an internal territorial rearrangement of the Russian and Ukrainian Republics.

It also elected a Supreme Court in accordance with Article 105 of the Constitution, which prescribes five years as the term of office. Nothing is said in the Constitution as to the size of the court. There was unanimous approval of official nominees for forty-five members of the court, and twenty 'People's Assessors.' The official candidates were each elected unanimously. In March, 1946, a new court was elected consisting of a chairman, seventy-five members and twenty-six People's Assessors. The 1938 Supreme Soviet also approved decrees of the Praesidium which had appointed five People's Commissars (now called Ministers) and named one of them as vice-chairman of the Council of People's Commissars (now called Council of Ministers).

#### **Praesidium of the Supreme Soviet**

The role of the Praesidium is as already indicated of great formal importance, during and between the sessions of the Supreme Soviet. Its thirty-three members are indeed the standing constitutional authority. In spite of the fact that a suggested amendment to the Constitution pro-

posing to confer upon it provisional rights of legislation was rejected on the ground, in Stalin's words, that it ran "counter to the principle that laws should be stable," the Praesidium has the power of interpreting existing laws and promulgating decrees. Experience has shown that the interpretation of this has been elastic enough to give the Praesidium what are in fact legislative powers. Thus a decree of the Praesidium of 26 June, 1940, enacted penalties for workers quitting their existing employments without authorization and a further one of 19 October invested the People's Commissars with wide powers for the compulsory transfer of workers to new jobs. A decree of 2 October provided for the compulsory mobilization of from eight hundred thousand to a million youths from the ages of fourteen to seventeen for training as a labour reserve in industrial and other special schools. Political Commissars in Red Army formations were reintroduced by a decree of 16 July, 1941, and abolished again in a decree of 10 October, 1942. On 29 December, 1941, the Praesidium introduced the war tax, whilst on 30 April, 1942, it modified the income tax. On 15 April, 1943, the entire Russian railway system and its workers were placed under martial law. A decree of 8 July, 1944 introduced a vast new scheme of family allowances and provided drastic new limitations on the right of divorce.

#### **Further Powers**

In addition to legislative activities which penetrate into every sphere of national life the Praesidium has the power to annul decisions and orders of the Councils of People's Commissars of the Republics and of the Union Council, if they do not conform to law. It has the right of dismissing Ministers and appointing new ones, subject as we have seen, to confirmation by the Supreme Soviet when it next meets. It appoints and dismisses the High Command, proclaims war and general or partial mobilization, ratifies international treaties and appoints the country's representatives abroad. For this reason the chairman of the Praesidium sometimes performs functions which make his office analogous to that of

1 British constitutional monarch or of a president under the French Third Republic but his powers are much less and he is not in any sense head of the State

### Council of Ministers

The Union executive—the Council of Ministers, formerly the Council of People's Commissars—possesses powers which are also quasi-legislative. For by Articles 66 and 67, the decisions and orders which it issues on the basis of Soviet laws are binding throughout the country. These decisions and orders can be of far-reaching importance. Thus it was an order of the Council of People's Commissars of 3 October, 1940, which introduced fees in secondary and higher education. The authority of such an order may be enhanced by associating with it the party and other public organizations, although there is no warrant for this in the Constitution. A new principle in the administration of sickness benefits was introduced in December 1938, in "An order of the Council of People's Commissars of the U.S.S.R., of the Central Committee of the Communist Party and of the Union Council of Trade Unions." It was signed by Molotov, then chairman of the Council of People's Commissars, by Stalin as general-secretary of the party, and by Shvernik as secretary of the Trades Union Council. On 10 September, 1946, a decree of the Council of Ministers and the Communist Party set up a Council on Collective Farms attached to the former. Later, a separate ministry was set up.

The Council of Ministers, with a membership of sixty or more, is clearly not suited for the functions of an executive in the collective sense. It is not a cabinet. But on 30 June, 1941, a new body, the State Committee of Defence, was set up and this body of about eight members, representing the party and the army as well as the State machine, was a veritable war cabinet and exercised very sweeping powers. These again might be described as quasi-legislative. For instance, it ordered part-time military training for the entire able-bodied male population of the Union.

In peacetime it has been replaced by an

inner cabinet of the prime minister and ten vice-premiers. This is the real cabinet in as far as one exists, but even this has an inner core—the 'bureau' with a membership of nine.

The Council of Ministers provides yet another instrument of central control. By Article 69 it is empowered "in respect of those branches of administration and economy which come within the jurisdiction of the U.S.S.R. to suspend decisions and orders of the Councils of People's Commissars of the Republics."

Similarly the latter can suspend orders and decisions of the Councils of the Autonomous Republics and annul the orders of Executive Committees of the lesser territorial units.

### Composition of the Council

The composition of the Council of Ministers is constantly changing and only an approximate account of it can be given. It consists in the first place of a chairman (the nearest equivalent to a prime minister under the British system). There are also the ten vice-premiers. Some of these preside over the economic councils, of three to five members each, under which are grouped all those ministries (formerly called commissariats) which exercise economic functions—the majority of them. The council also includes the heads of certain commissions and institutions which do not strictly rank as ministries. These were in 1947 the important State planning commission (*Gosplan*), and the Arts, Higher Education and the State Bank, now under the Ministry of Finance. Some of these bodies exercise controlling powers over those republican ministries to which no corresponding federal ministries exist. Such are the Commissariats for Education, Local Industry, Local Fuel, Municipal Economy, Automobile Transport and Waterways. White Russia alone appears to have an additional Commissariat of Melioration charged with some of the problems of reconstruction after the wartime devastation of that republic.

The central ministries, whose heads compose the bulk of the council, total over forty, some being also vice-premiers.



## LAW AND GOVERNMENT IN THE U.S.S.R.

### THE KREMLIN IN THE WINTER

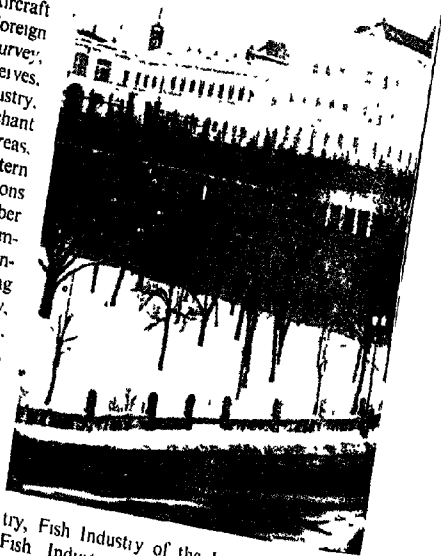
*Residence of the Russian tsars of the old régime, the Kremlin is a walled city within a city. There are five entrances and nineteen towers, and within the walls are the Great Palace of the Tsars, now used as government offices, and the Uspenski Cathedral built by Ivan III. High officials of the Soviet Government have rooms and offices in the Kremlin and it is said that Premier Stalin seldom leaves its precincts.*

are divided into two groups. There are Union ministries which work in the Republics directly through their own officials and Union-Republican ministries which in exercise of the principle of dual subordination work through the corresponding ministries of the Union Republics.

According to the revised version of the Constitution of February, 1947, the Union ministries were the following: Aircraft Industry, Automobile Industry, Foreign Trade, Munitions, Geological Survey, Agricultural Stocks, Material Reserves, Machine and Instrument-making Industry, Medical Supplies Industry, Merchant Marine, Oil Industry of the Eastern Areas, Oil Industry of the Southern and Western Areas, Food Reserves, Communications Equipment Industry, Railways, Rubber Industry, Laland Water Transport, Communications, Agricultural Machinery Industry, Machine-Tool Industry, Building and Road Building Machinery Industry, Construction of Army and Navy Works, Construction of Heavy Industry Works, Construction of Fuel Industry Works, Shipbuilding, Transport Machinery Industry, Labour Reserves, Heavy Machine-Building Industry, Coal Industry of the Eastern Areas, Coal Industry of the Western Areas, Chemical Industry, Non-Ferrous Metals Industry, Pulp and Paper Industry, Iron and Steel Industry, Electrical Industry, Power Stations. The Union-Republican Ministries were: Grocery Supplies Industry, Internal Affairs, Armed Forces, Higher Education, State Control, State Security, Public Health, Foreign Affairs, Cinematography, Light Industry, Timber Industry, Meat and Dairy Industry, Food Industry, Building Materials Indus-

try, Fish Industry of the Eastern Areas, Fish Industry of the Western Areas, Agriculture, State Farms, Textile Industry, Trade, Finance and Justice.

It is not necessary that each Republic should have every single one of the corresponding positions filled, but all of the Republics appointed foreign ministers as they were entitled to under the constitutional amendments of 1944.





The legal history of the Soviet Union is too closely connected with the social development of the Soviet Union and with the development of its ideology to lend itself to a brief exposition. It must be enough here to note that the tendency has been away from the original view that a permanent legal system and a professional legal apparatus are unnecessary to a socialist society and towards accepting the

necessity for formal legal relations and for adequate means of interpreting them.

Nevertheless the courts are not neutral exponents of an abstract justice as between individuals or as between individuals and the State, like other Soviet institutions they have to conform to the purposive nature of the State. According to the law of August 1938, their task is to protect first 'the organization of society and of the State of



#### SOME SOVIET JUDGES

*Above are three People's Assessors who correspond very roughly to Justices of the Peace in Britain. Their work as judges is something apart from their normal occupations although they receive a certain amount of training before sitting as magistrates. Below, the defendant (extreme right) argues his case with his three judges, two of whom are women. It is a minor case—a housing dispute—and the atmosphere is not at all formal.*



the U S S R and "the socialist system of economy and socialist property and second only, the individual rights and interests of citizens and public organizations. By all their activities, declares this Act, 'the courts educate the citizens of the U S S R in the spirit of devotion to the country and to the cause of socialism, in the spirit of the strict and undeviating observance of Soviet law of care for socialist property, of labour discipline honesty towards State and public duty and respect for the rules of socialist human intercourse' Soviet jurists, even after the purge of many of their leaders in 1936, continued to speak of socialist law as an instrument in the socialist reconstruction of society.

#### Supreme Court and Lesser Courts

The Constitution of 1936 emphasized the importance now attached to the legal system by further centralizing it. The Union government has not yet exercised the right which it then acquired to promulgate new civil and penal codes, but government commissions have been preparing unified codes for some time. The Supreme Court has supervisory functions over the system of courts—which is mainly a republican matter—and there are lesser federal courts with jurisdiction on matters relating to the armed forces and to railway and water transport. But the Supreme Court has no power of pronouncing on the constitutionality of laws, whether federal or republican.

Like the Supreme Court, the superior courts in the Republics are elected by the relevant soviets. Only the local "People's Courts" are directly elected by the people. It is, however, not merely through a hierarchy of tribunals that the supremacy of the Union is exercised. Under codes which attach so much importance to the protection of public property and to other offences of a public nature, the role of the State Prosecutors (Procurators) is of great importance. The Procurator-General of the U S S R is elected by the Supreme Soviet for a term of seven years and he nominates the Procurators of the Republics, Territories and Regions, who in their turn nominate the Procurators of the Districts

Areas and Cities. By Article 117 "the Procurators' offices perform their functions independently of any local organs whatsoever and are subordinate solely to the Procurator of the U S S R. Article 127 which guarantees the inviolability of the person, makes arrest possible either by the decision of a court or with the sanction of a procurator.

The position of the procurator strengthens from the legal point of view the position of the State police, functioning after 1934 under the Director-General of the Security of the State, an official of the Commissariat of the Interior but who were recently coming under the separate Ministry of State Security. This possesses a great apparatus of coercion which the wide definitions of treasonable and counter-revolutionary activities under the Soviet code make it easy to bring into play. The Constitution itself in Article 131 defines persons "encroaching upon public socialist property" as "enemies of the people"—a term of ominous elasticity.

#### Control of Revenue

From the point of view of Western federalism, the most surprising departure from accepted ideas is perhaps to be found in the financial arrangements of the Union.

Instead of a division of the field of taxation so as to provide separate sources of revenue for the Union and for its constituents, the Union is the primary taxing authority, allocating from its revenues sums to cover the budgets of the Republics and lesser units which it authorizes. These sums have been comparatively small, as might be expected from the limited functions allotted to non-Union authorities. Thus, in 1937, the allocations for this purpose amounted to about sixteen thousand million roubles out of a total national expenditure of more than ninety seven thousand million roubles, about 16 per cent. In 1940, the proportion was as high as 23 per cent. By the 1944 budget it sank again to 15 per cent and by 1945 to just under 10 per cent, but in the 1946 budget, passed in October 1946 it rose to about 19 per cent, and in the 1947 budget, passed in February 1947 to about 23 per cent.

Since the Republics finance the development of their light industries but not of the heavy industries which depend on the Union ministries the main reason for a drop in the proportion under-wartime conditions is clear. On the other hand, it looks as though the principal expenditure for the rehabilitation of those Republics—White Russia and the Ukraine—which have suffered most from the war is being carried out on the Union budget. No provision was made in the 1944-1946 budgets for expenditure by the Republics on representation abroad or on military forces, so that it appears that the constitutional changes taking place are not being reflected in financial administration.

#### Soviet Book-keeping

The revenue side of the Soviet Union finances naturally reflects the existence of a socialized economy. The most important heading in the pre-war period was the "turnover tax." This accounted for some two-thirds of the State's income in the nineteen-thirties and for three-fifths in 1940. Under this head was included the profit made by the State from the resale of the compulsory deliveries made from the collective farms, as well as the "turnover tax" proper, which is a tax upon the stages passed through by a given product from the raw material to the consumer. It is thus an indirect tax and falls largely on consumption. Direct taxation whether of the State-owned industrial enterprises or of individuals furnished a much smaller amount. The same was true of the State loans. In 1942 and 1943 the Supreme Soviet did not meet and no budget was published. Later figures show that the turnover tax produced 34 per cent of the total revenue in 1943. The budget of 1944 showed that the turnover tax was expected to provide only a third of an expanded revenue in spite of drastic increases in the rate at which it was levied. Preliminary figures show that the turnover tax in fact yielded 43 per cent and the same in 1945. In 1946 it provided about 37 per cent, and in 1947 about 62 per cent. Thus the Soviet State relies for its capital reconstruction largely upon the resources of the State

enterprises and organizations themselves. Loan revenue in wartime does not seem to have accounted for more than one tenth of the whole, in spite of the probability that all who could afford to subscribe made the maximum contribution.

There is of course an element of fiction in the whole financial system since the State in taxing industry is really taxing itself. But the general scheme has been that the industrial commissariats work through separate enterprises which are regarded as distinct from the point of view of management and finance. This method—which may have suffered some damage from the exigencies of wartime production as has free capitalism elsewhere—is likely to be restored in principle, since it provides what appears to be the best method so far devised for controlling costs and efficiency through a system of accountancy within a socialized structure. Even so, it demands an enormous administrative overhead since the commissariats have a complicated internal structure according to the functional and regional divisions while between the commissariat and the individual factory there is normally the intermediary of a trust, grouping several enterprises and performing most of the external functions of management. Thus in October 1942 it was learned that the People's Commissariat for Building had allocated all building work to a small number of trusts each responsible for a large industrial area. Two of these were known to operate in the Urals where a great deal of industrial building was going on, following the German advances in Western Russia.

#### Consciousness of Bureaucracy

The large bureaucracy which such a structure involves is of course a fundamental component of Soviet society the theory of mass-participation notwithstanding. It has been estimated that there were immediately before the war some ten to eleven million State officials compared with forty million peasants and eighteen to twenty million workers including about eight millions in industry (and excluding those on forced-labour projects). Much of the emphasis on active citizenship particu-

larily in the case of party members, is due to oft-repeated conviction of Soviet leaders that bureaucracy is itself an obstacle to healthy social progress, but no radical and permanent remedy seems to have been found. There was no doubt altered considerably the distribution of Soviet manpower, the compulsory service army of peacetime was greatly expanded and losses were heavy but it is too early to say what the permanent effects of this will be either on the social structure of the Soviet Union or on its institutions.

#### Communist Party

From the formal point of view the higher grades of administration and the higher ranks of the army together form a new ruling class whose pre-eminence is revealed by many significant details in the Soviet Union's daily life. In spite of the fact that the years of tension and of war have seen the Soviet Union's rulers summoning to its aid all the psychological resources inherent in an appeal to national tradition the main ingredient in the new amalgam which we may call Soviet nationalism is clearly to be the party of Lenin and Stalin. Although the party and its doctrines appeared somewhat in eclipse during the period of defeat in 1941-1942 there has since been an ever-growing emphasis on its role and upon the fact that Russia owes her salvation to the system of soviet socialism adopted under the party's guidance. Since 1943 an extensive campaign of political education particularly for the rural population has once more been embarked upon. In September 1946 a higher school for Party and Soviet Cadres was created under the direction of the executive committee of the Communist Party. Joseph Stalin, President of the Council of Ministries and of the war-time Committee of State Defence, Generalissimo of the Soviet Union and Secretary General of the Communist Party, embodies this combination of ruling class and ruling party in his own person. The adulation to which he is officially subject and which is unparalleled even in these days of leader-worship, must be taken as a symbolic representation of the fundamental facts in

the institutional life of the Soviet Union.

The history of the Russian (All-Union) Communist Party, of which the official account is the compulsory basis for all political study is like the history of the Soviet Union itself a blend of revolutionary change and subtle continuity. In the course of three decades it has been transformed from the spear head of the revolutionary proletariat into the dominant force in an established order. During the period since the Revolution the size of the party has varied considerably and as a result of successive purges the turnover of membership has been very high. At the Seventeenth Party Congress which met in January 1934 and which adopted the revised statutes under which the party is now constituted the membership was given as 1 872 000. There were also 935 000 candidates (or probationers). At the Eighteenth Congress which met in March, 1939, the membership was announced as 1 588 900 with 888,800 probationers. The Amendments to the Party Statutes approved by the same Congress facilitated the admission of members particularly among the younger generation. Total membership rose to 3 400 000 in 1940 to 4 600 000 in February, 1944 and to 5 700 000 in January 1945. The main reason was group admissions from the army and from important factories and administrative units. By the last date more than half the party may well have been in the army in spite of heavy losses at the front where party members were expected to show an example of heroism and self-sacrifice.

#### Demands on the Membership

Then it would seem that a reaction against this policy set in and as before, the party was to be opened only to those whose individual qualities and capacity to understand the party's doctrine promised scrupulous performance of the heavy tasks which membership demands of them. Many recently enrolled full members were reported to have been demoted to the rank of probationer but at the end of 1946 there were more than six million members in 225,000 cells and other party organizations. The real mass organization is the

*Komsomol*—the association of Communist Youth (in which the word youth is rather generously interpreted) The membership of this body is probably over seventeen million and it is one of the major forces in conditioning the rising generation to a ready acceptance of Soviet standards of belief and conduct

#### Party Congress

Although the party is nominally built up on a system of pyramidal representation with the Congress at the top, this body, like the Supreme Soviet, is the dignified rather than the efficient organ of the party. For one thing it is a very large as well as an increasingly rare affair. The Eighteenth Congress had 1,965 members. The Central Committee, which corresponds to the Praesidium of the Supreme Soviet, is, however, a body of genuine importance. It consists of about seventy members and almost the same number of substitutes or alternates (a feature which constantly recurs in Soviet institutions). The committee is elected by the Congress, but the amendments to the charter in 1939 recognized the time-honoured practice of holding party conferences (composed of party officials from the localities), and these conferences can replace up to one-fifth of the membership of the Central Committee, from the list of alternates. The eighteenth conference which met in February, 1941 acted in this sense and, as usual, demotion from the Central Committee meant the simultaneous loss of the commissarships and other posts in the State organization held by the members in question.

#### "Democratic Centralism" in Party Life

The actual running of the party machine, of which the local secretaries form the backbone, is carried out by four organs appointed by the Central Committee. These are the Secretariat, the Political Bureau (*Politbureau*) the Organization Bureau and the Commission of Party Control. In the past, the *Politbureau*—a small body of about fourteen members—has generally been credited with being the effective government of the Soviet Union, from the point of view of general policy. All its

members either make up the Bureau of the Council of Ministers or hold other equally important posts. In spite of the original stress on intra-party democracy, discussion on fundamental matters is only possible in the primary units, if invited by the Central Committee. Discussion is not permitted on any policy on which the Central Committee has decided its policy. The sanctions against recalcitrance—including but not limited to that of expulsion—are strong enough for the façade of unanimity never to be broken. But discussions in the primary units are private and on matters undecided may be reasonably free. Since such discussions are reported to the higher party authorities, they provide the most valuable means at the Soviet Government's command for ascertaining the temper of the people, or at least of its most active element.

"Democratic centralism," to use the Soviet phrase, is thus as marked in the party as in the State. Control and direction from above are no less vigilant and all embracing. The existence of a hierarchy within the party is freely admitted. In a speech in 1937, Stalin differentiated between the 150,000 or 200,000 members who have mastered the party's principles and the rank-and-file who merely accept them. This distinction was recognized in the 1939 amendments to the party statutes when acceptance of the party programme and not necessarily a full understanding of it was made the requisite for membership. (Be it noted in passing, that the post-revolutionary programme of the party was accepted in 1919 and is still in force. The 1939 Congress appointed a commission under the chairmanship of Stalin to revise it and to report to the next Congress.) It has been suggested that the real core of the party is even smaller than Stalin stated and that everything depends on some thirty or forty thousand persons in key positions.

#### Composition of Party Membership

The party's hold on the State is partly social and partly institutional. With regard to the former it is only necessary to state that the party is not, of course, in the normal sense a working-class organization. A big proportion of its membership is supplied



THINKING IT OVER

*A Russian audience listens to a speech of the Foreign Minister in the Hall of Columns in Trade Union House, Moscow. Their mood is serious and thoughtful.*



by the State administrative apparatus and by the army, especially its higher ranks. It has more and more come to be the case that no important position administrative, managerial or military is held by anyone but a party member. Members of the *Politburo* who formally held aloof from the State machine now hold ministries and other key posts and when they have military functions assume appropriate military rank. As a result of the successive purges and new intakes the party of today contains a very small proportion of members of long standing and its average age must be very young. Like the main organs of the State it already contains a very large number of important figures whose whole adult life has been passed under the Soviet regime. Given the exclusive nature of the intellectual formation of the Soviet elite this is a fact whose international significance can hardly be overestimated.

#### Absence of Opposition Parties

The institutional aspect of the party's domination was formally recognized for the first time in the Constitution of 1936. Article 26 runs as follows: "In conformity with the interests of the toilers and in order to develop the organizational initiative and political activity of the masses of the people the citizens of the U.S.S.R. are ensured the right to unite in public organizations—trade unions, co-operative associations, youth organizations, sport and defence organizations, cultural, technical and scientific societies, and the most active and politically conscious citizens in the ranks of the working class and other strata of toilers unite in the Communist Party of the Soviet Union (of Bolsheviks) which is the vanguard of the toilers in their struggle to strengthen and develop the socialist system and which represents the leading core of all organizations of the toilers, both public and state."

The foundation of this institutional pre-dominance is the assurance that the party shall have an overwhelming majority in all elected bodies. In the electoral provisions of the Constitution of 1936 there was at first a measure of ambiguity. The relevant article (141) declares that "the right to

nominate candidates is secured to public organizations and societies of toilers, Communist Party organizations, trade unions, co-operatives, youth organizations and cultural societies. It was clear that no other parties were to be permitted."

In an interview given in March 1936 after the publication of the draft Constitution but before its final enactment Stalin said that there were no parties in opposition to each other because where several classes do not exist there cannot be several parties since party is part of class. But he said, people should not be misled by the fact that only one party would come forward since obviously election lists would be put out not only by the Communist Party "but by all kinds of public non-party organizations." He foresaw, he said, a very animated election struggle.

What in fact happened in December 1937, and in February, 1946 was that in each constituency a preliminary meeting was held, attended by the representatives of the Communist Party and of the other public organizations (in all of which party members are as has been seen the leading core), and these everywhere agreed upon a single official candidate. The preliminary election was conducted by show of hands and not by the secret ballot prescribed for the actual voting. No ballot paper therefore contained more than one name. In February, 1946 over 99.7 per cent of the electorate voted. About 99.2 per cent of the votes cast went to the "bloc" of Communist and non-party candidates. 800,000 voters voted against the official candidates by the only means open to them—striking out their names.

#### Post-war Elections

In the Supreme Soviet elected in 1946 there were 576 Communists out of a total of 682 members in the Soviet of the Union and 509 Communists out of 657 members in the Soviet of Nationalities. A similar device of a "bloc" of party and non-party candidates was used in the elections to the Supreme Soviets of the Union and Autonomous Republics in June 1938, and February 1947. On this occasion the official list was endorsed by 99.29 per cent of those

voting Elections in the territories annexed in 1940 were also conducted in this fashion. With regard to local soviets it should be noted that where insufficient party members are to be found to fill the proper proportion of seats, candidates may be brought in from outside the area in question. There is no residential qualification for membership of any elected body in the Soviet Union.

The connexion between party and State has been particularly tested in the case of the Red Army. There the device of political commissars in the individual units, thrice introduced and thrice abandoned, has been found to interfere too much with military efficiency by curtailing the responsibility of individual commanders. To some extent the problem has been solved by the increasing predominance of party members holding positions of command. In 1942, unit commanders were made responsible themselves for the political education of their troops, acting of course in co-operation with the party organization. The Political Department of the Army has remained a very important institution, and its chief one of the leading figures in the regime. A. Scheibakov, its head from the summer of 1942 until his death in 1945, was an alternate-member of the Politbureau and secretary of the important Party Committee of the Moscow Region.

#### Legal Force of Party Programmes

It is not only through political control or even through the individual exertions of party members that the hold of the party is maintained. The party itself possesses quasi-legislative functions. The five-year plans of economic development whose directives have in practice the force of law were party programmes and were considered in force as soon as adopted independent of any confirmation by the organs of the State. Quasi-legislative decisions have been taken jointly, by the party and the trade unions, the party and the co-operatives, and as has been seen by the party and the State. Party organizations are expected to function as extra arms of the administration, particularly in periods of emergency. In industrial management, the manager, the

party cell and the trade union works committee form an operative triangle though there has been the increasing tendency towards the independence of management. The party organization has assisted managements in running production drives and has tackled such tasks as the co-ordination of industrial management on a regional basis and the supervision of the distribution of labour and materials between the various enterprises. These administrative functions have not been limited to matters affecting national defence. The Communist Party paper, *Pravda*, commenting on the decree of August 1943 abolishing co-education in secondary schools wrote: 'the Provincial and Territorial Party Executive Committees and the People's Commissariats of the U.S.S.R. and of the Autonomous Republics must guarantee the carrying out of this important decision.'

How does the ordinary citizen stand in relation to this whole mighty edifice? Some indications of the limitation upon his political rights have already been given. The provision for a referendum in Article 49 of the Constitution has never been put into effect. Prior to 1936 there were several occasions—the most notable being that of the draft Constitution itself—when legislative projects were put forward for popular discussion in various local bodies, before their enactment. It does not appear that such discussions ever resulted in major changes in the Government's plans even when considerable evidence of disagreement was forthcoming. The machinery of the party of course makes it easy for the Government to get 'spontaneous' resolutions passed by factories and other bodies whenever these are required to impress home or world opinion.

#### Rights of the Individual

The enumeration of individual rights in the Constitution must be read like the rest of the text, in the light of the overriding intention to build a communist society and to subordinate individual welfare to this end. The extension of the Soviet 'bill of rights' (Articles 118-133 of the Constitution) to include economic and social guarantees is the foundation of the claim

that the Soviet Constitution goes beyond bourgeois constitutions in making possible the effective exercise of the rights which the latter merely claim in the formal sense. The economic and social guarantees include the right to work, the right to leisure and to maintenance in old age and sickness. Since the State exercises complete control over the country's economic life, its ability to dictate the distribution of the national income is obvious. Thus it can, if it wishes, provide for paid holidays and social services at the expense of consumer goods to any extent it desires. These rights are thus in a sense obligations because the wage deductions which pay for these rights are inescapable.

#### Employment and Education

On the other hand, particularly since the decrees of 1939 and 1940, the worker has become more and more subject to labour direction. Since there is in effect only a single employer, this is the easier to enforce and the housing shortage provides an additional sanction. The right to education is, of course, interpreted as the right to education by the State, every other kind being forbidden by law. The Constitution gives among the guarantees of this right the fact that education, including higher education, is free of charge. This (without a formal constitutional amendment until February, 1947) ceased to be the case during the war. Combined with the already mentioned system of conscription for a labour reserve (which may, of course, not be permanent), this change appeared to be one of those which seem to give something in the nature of a privileged status to the higher income groups in Soviet society.

Equality for women is a concept which has been variously interpreted at different periods of Soviet development, and has been affected by the adoption of policies designed to increase the rate of population-growth. But here as in its efforts to secure equal rights for all races within it the Soviet Union appears to have legitimate cause for pride. The constitutional provision making race-privilege and the encouragement of racial or national exclusiveness a legal offence is in accordance with

the general tendency to create a feeling of Soviet nationalism, embracing and perhaps eventually superseding the separate nationalisms whose cultural autonomy the present federal system is designed to foster.

The question of religious freedom is one which has occasioned much controversy and recent developments have shown that the problem of Church and State is not yet an obsolete one.

#### Freedom of Conscience

Article 124 of the Constitution states that in order to ensure to citizens freedom of conscience, the Church in the U.S.S.R. is separated from the State, and the school from the Church. Freedom of religious worship and freedom of anti-religious propaganda is recognized for all citizens. This article must be taken together with Article 13 of the programme of the party which declares that "the party aims at completely destroying the ties existing between the exploiting classes and the organization of religious propaganda by helping to set the toilers free from religious superstitions and by organizing the most intensive scientific-educational and anti-religious propaganda". In view of the official attitude of the party it is not difficult to understand that the scales between religious and anti-religious propaganda have not on the whole been kept even. In spite of the wholesale confiscation of ecclesiastical property, individual congregations could in many cases have churches and the articles of the cult allotted to them for the performance of religious rites and were allowed to contribute to the support of a priest and the other expenses involved. According to the Soviet Press, more than thirty thousand religious communities were in existence in 1937.

On the other hand, the prohibition of institutions for religious education and of all religious teaching to those under eighteen years of age, the inability in view of the State monopoly of the necessary facilities, to print works of devotion and the political suspicion attached to participation in religious rites were very considerable handicaps even during periods when direct pressure was at its lowest. The most recent



### AS VOTING TIME DRAWS NEAR

*At preliminary elections the name of a single official candidate for each constituency will have been put forward. There is no opposition party in Russia. The factories and assembly shops (left) are social centres for the purpose of political discussion which grows more intensive as election time approaches. Below the identities of Moscow electors are checked on the Voters Roll before electors receive their voting cards. In 1946 99.7 per cent of the electorate voted.*

wave of anti-religious measures that of 1937-1938 ended in "an admission of failure and those formally responsible were accused of having deliberately stirred up trouble for the Government.

Insufficient information is so far available on the recent apparent rapprochement between the State and the Orthodox Church for a clear picture of the present situation to be drawn; nor in this context can it be discussed whether the change is the result of the desire to capitalize on behalf of the regime a force which has proved its strength among the Russian people, or of some calculations based upon the exigencies of Soviet foreign policy. It dates from the time of Germany's attack when loyal messages were published from the leaders of the Orthodox Church as well as of other religious communities. Church organizations took part in welfare work for the armies and for soldiers' dependants. In November, 1942, the Metropolitan of Kiev was made a member of the State Commission for the investigation of German atrocities, the first official appointment held by an ecclesiastic since the Revolution. In September, 1943, representatives of the hierarchy were received by Stalin and granted permission to proceed to the election of a Patriarch and the formation of a Holy

Synod. In the following month a Council for the Affairs of the Russian Orthodox Church was set up under the supervision of the Council of People's Commissars. Facilities were also given for the publication of a journal by the Moscow patriarchate, and theological institutes set up in



Moscow, Leningrad and Kiev. Thus within the narrow limits described the Church appears to form the single exception to the ideological monopoly of the party.

The other normal democratic freedoms are placed in a context which reveals their inadequacy under the Soviet system. Article 125 runs as follows: "In conformity with the interests of the toilers, and in order to strengthen the socialist system, the citizens of the USSR are guaranteed by law: (a) freedom of speech, (b) freedom of the Press, (c) freedom of assembly and of holding meetings, (d) freedom of street processions and demonstrations. These rights of citizens are ensured by placing at the disposal of the toilers and their organizations printing presses, stocks of paper, public buildings, the streets, means of communication and other material requisites for the exercise of their rights." The facilities so granted can obviously be withheld at will and are in fact only available for purposes congenial to the regime.

#### Press and Publishing

The freedom of the Press is perhaps the field in which the State monopoly of facilities is most telling.

Although the State, the party, the trade unions, and the army have their own papers and publications, they betray a common character. Where a divergence of opinion appears, or criticism of some previously held belief or previously admired public personality, it may sometimes be taken as the warning of a change of attitude on the part of the highest authorities. This is true in both internal and external affairs. In the latter case it has the advantage that the Soviet Government does not accept formal responsibility for *Pravda* and other party organs. In the internal sphere innumerable examples could be quoted. Early in December, 1943, *Pravda* attacked the Commissariat of Agriculture for having failed to provide for the production and repair of spare parts for agricultural machinery. On December 11, the Commissar of Agriculture was demoted and made a vice-commissar in his own department. The new commissar was a member of the *Politbureau*, the choice of an energetic

party leader to head it being the usual method of dealing with a commissariat in difficulties.

#### Seclusion from Foreign Influence

The State monopoly over publishing (and, of course, over all other forms of publicity) is enhanced in its effect by the restrictions upon the power to travel abroad. Visits abroad for the Soviet citizen are only possible for those on official business, and while abroad they are discouraged from entering into close relations with the people of the countries concerned. Similarly, Soviet citizens are discouraged from having private contacts with foreigners resident in or living in Russia. The impressions made by the official sources of publicity are thus not subject to correction by juxtaposition with systems and minds from outside the Soviet orbit.

Perhaps the ordinary citizen is less affected by this than by the Soviet version of the final right, that of uniting in public organizations. As already seen, all such organizations must be controlled by a nucleus of party members. Apart from this many of them have different functions from those performed by similarly styled associations in non-socialist countries. This is most obviously true with regard to the trade unions. Since the interest of the workers is identified in Soviet theory with that of the State—their own employer—their share of the product of their labour is fixed by the plan of national economy and is not the product of collective bargaining although the trade unions help on the technical aspects of wage-fixing. Early experiments in workers' control of factories and co-operation in management have given way before the need for increasing productivity. Soviet management has increasingly tended to approximate to management as it is known in the capitalist world. In so far as the Soviet trade unions are active on the productive side their business is to stimulate production by developing "socialist competition, rationalization, and factory discipline. More important are their administrative responsibilities which cover the fields of social

insurance factory regulations and workers cultural and recreational amenities. The organization is thus important as well as large. In 1938 there were over twenty two million trade unionists out of twenty six million wage and salary earners. The annual conference of 1940 disclosed a total of over two hundred thousand paid officials and the conference was wholly taken up with the question of combating "bureaucracy" and other matters of organization rather than with questions relating to the conditions of the ordinary worker which would be the staple theme of a similar gathering in a capitalist country. The Soviet trade unions, like other Soviet organizations, rely a good deal on voluntary work, particularly by party members. Still more recently, the trade unions have come forward as political spokesmen in the international field—a development significant for Soviet foreign policy rather than for any clue it provides to the specific interests of trade union members.

The Soviet citizen thus faces the State alone—in spite of the revived emphasis on the family group and the improved status of the Church. Soviet society is at once highly atomized and highly integrated. There are none of the innumerable intermediate groupings which in Western society make up the real pattern of free activity. To what extent the emergence of a definite hierarchy of income and status

may alter this it is not possible to say.

Nothing that happened during the war or in its early aftermath has weakened the conviction that Stalin expressed in November 1944 when he said: "This all goes to prove that our socialist State possesses incomparably more vitality than any other State. The socialistic regime established by the October revolution has endowed our people and our army with immense power. How far this vitality and power can continue to provide compensations for the lack of what the West regards as freedom it is beyond the province of a student of institutions to answer. Certainly there appears no immediate likelihood of any alteration of Soviet institutions and institutional practices to conform to this alien ideal. Nor, indeed, does Soviet socialism provide the necessary material conditions."

If therefore, we take as an example of Western democracy, the democracy of the United States, it is clear that Stalin's remarks in March 1936, are as appropriate today as ever: "American democracy and the Soviet system can exist simultaneously, and compete peacefully. But one cannot develop into the other. The Soviet system will not evolve into American democracy, or vice versa."

This chapter includes where possible changes and developments in Soviet institutions during recent years. The author wishes to acknowledge the help of Miss Violet Conolly in following internal developments in the U.S.S.R. during this period.

### Test Yourself

1. What does the word 'Soviet' mean?
2. Who are the two creators of the philosophy of the present system of government of the U.S.S.R.?
3. How does Soviet theory distinguish between Socialism and Communism?
4. What is the relation between the Constitution of the U.S.S.R. and the Communist Party?
5. How is it that in the U.S.S.R. the control of the central government is practically absolute in spite of the formally federal character of the Constitution?
6. How is the Supreme Soviet constituted?
7. What is the Praesidium?
8. What is the formal basis of Stalin's powers?
9. How does the position of a trade union in the U.S.S.R. differ from that of one in Western Europe?

*Answers will be found at the end of the book*



#### SUNSHINE AND SHADOW

*This peasant-farmer tilling his paddy field within easy reach of his weapons—modern rifle and ancient sword—can be taken as the symbol of China over the last quarter of a century, for her progress towards democracy has been marked, not only by a terrible and successful struggle with Japanese imperialism, but by an even more protracted internal strife between social forces seeking different goals*

## LAW AND GOVERNMENT IN CHINA

THE word 'China' embraces an area double that of Europe and this has been the case with intervals of confusion and even of prolonged disruption, for about two thousand years. We are considering, therefore, a political entity which for its combination of size and length of existence is unique in history. In it different racial elements have had long ages in which to amalgamate. The result except in the border regions has been a real integration: cultural differences have largely disappeared on the surface and it is only the expert in sociological investigation who can discern what in earlier ages were markedly distinct racial and cultural traits.

It is necessary to emphasize this last fact for the West has tended to see China as a country which has developed in isolation from other nations and with a culture narrow, limited, and of a single racial origin. It is clear today that these ideas are as untrue as the idea at the other extreme, namely that the Chinese are a fundamentally un-unified people. The truth lies between the two extremes. Thus for example in the southern border provinces some millions of indigenous peoples retain their own languages and customs and types of social organization and the north western provinces are populated mainly by semi-central-Asian people with an ingrained Mohammedan tradition. These communities have not been absorbed into one all-engrossing mass in spite of the power which the original Chinese culture of the Yellow River area has had in itself.

In view of these exceptions we see what is also plain in other ways that the Chinese traditional theory of government contained an element of easy-going tolerance in it that in fact the temptation of all bureaucracies to simplify government by enforcing uniform customs and belief has not had complete right of way in China. This is highly significant since for nearly a hundred consecutive generations one or

another form of Confucianism has been the dominating (although by no means the sole) philosophy of life in China.

Any number of illustrations could be cited to prove that most of China's governors particularly the emperors and their advisers saw in this Confucian culture an excellent tool for ensuring social stability and took measures accordingly. One need only refer to that most famous of Chinese political institutions the state examinations, to realize the force of this. For eight hundred years candidates for government service could not hope for success unless they were learned in the Confucian scriptures and had shown their acceptance of the principles there laid down. And yet there was this element of tolerance revealing itself in special governmental arrangements for racial minorities and in the continuance of local self-government in all parts of the country. Not only so: the Chinese have seldom given way to the heresy-hunting temper, and until they came to doubt and fear the intrusive Westerner, have been less hostile to strangers than most peoples in world history.

## Tradition, Bureaucracy and Laissez-faire

It is this combination of tradition directed, bureaucratic government and go-as-you-please which must be stressed if the part played by Chinese law in Chinese government is to be properly apprehended. Behind this combination lies a deep consciousness of government as having two sides: a positive and a negative one.

On its positive side government was primarily the function of a Heaven-appointed representative, the Emperor—the Son of Heaven—who in his person and his way of life must embody the moral order of the universe, be as sun and rain and dew to the well-meaning but ignorant people within his dominions. Without his beneficent influence social harmony could not prevail. Thus one of his prime functions was to order the calendar so that the



farmers might be sure of hitting the right time for ploughing and reaping. Thus also a very common term in the state records all down the ages has been *chiao ling ling* being commands, *chiao* a word originally meaning "teaching," and then used for the basic doctrines of a great teacher or system of thought, and so current in the expressions "Confucian *chiao*," "Taoist *chiao*," "Buddhist *chiao*." A *chiao ling* was the promulgation of a moral principle, vouched for by imperial authority as conducive to the people's lasting welfare. It was distinguished from a fiat dealing with some concrete detail of administration.

#### Teaching and Punishing

On the other hand, there was a negative side to government, namely the "punishment of the wicked and the restraint of the uncontrolled" elements in society. For the sake of the good the Son of Heaven was compelled to take severe measures. Some crimes were so outrageous that they not only upset the harmony of society but also the order of the seasons, causing unseasonable rains and sunshine. This restrictive deterrent side to the emperor's authority was, however, regarded as useless, and even as a positive evil, unless it was complemented by the emperor's teaching. If he should fail to educate positively and his rule depend on the people's fear of the penalties of the law, then that rule was a bad rule, engaged more in trapping the people than in saving them.

The same was true of the rule of the representatives and delegates of the Son of Heaven: the officials of every grade down to the county heads. Their business, too, was to give instruction as well as to punish. It was not for them to drive or bully the people under their charge. Rather they were there to encourage them in all good works: in scholastic education, the reform of manners and morals, the undertaking of public works, bridge-building and dyke-strengthening, the development of new industries, even the equitable settlement of their own quarrels by their own self-appointed middlemen. From this angle we can see the reality of the *laissez-faire*

quality in government. The emperor and his officers were rather like the House of Lords according to Gilbert and Sullivan, their main function being "to do nothing in particular and do it very well."

#### Recent History

We turn now to China today, or rather the China of yesterday, which in 1911 and 1912 abolished the traditional imperial order and established a republic with a president and a parliament, with the intention of making a new people, living in a democratic liberty guaranteed by the articles of a formally adopted constitution. That objective, as everyone knows, was not reached.

Before the country knew where it was, the newly elected parliament had become a cipher; and the provisional president, Yuan Shih-kai, exercised whatever powers he chose. Not only so, before a decade had passed the power of the Central Government was little more than a name in many provinces: the rule of the war-lords was in full swing, and no man's pocket or person was safe from their arbitrary action. It looked as though when government by imperial prestige was discontinued, the linchpin of the State was removed. That inference is to a large extent true, and it is significant that when the *Kuomintang* (Nationalist) Government in Canton sent its armies north in 1926 to crush the war-lords and reunite China, they based their programme on the moral authority of Dr. Sun Yat-sen, the "Leader," as he came then to be called. There was however more to the political situation than this failure to achieve unity and the subsequent attempt to create unity through loyalty to the "Saint of the Revolution."

We have to go back to the new forces at work in the Manchu Government to the change of emphasis on law during the Manchu regime, to the promulgation in 1908 of the *Hsien Fa Ia Kang* (Constitutional Principles) and to the hurried promulgation in 1911 of a very different set of principles, the *Shih Chu Hsin T'iao* (Nineteen Articles). That came within a few weeks of the outbreak of the revolution and represented an attempt to placate public



### CHINA'S GREAT REVOLUTIONARY LEADER

*Dr. Sun Yat-sen, who sought to give China the key to modern democracy*

opinion. In the 1908 instrument the proposed parliament was a pure piece of window dressing: all the executive and legislative powers remained in the emperor's hands. In the 1911 instrument the emperor was relegated to a position in which he would reign but not rule: the executive officers of state were to be appointed by parliament, the laws to be passed by it and the taxes fixed by it.

#### Towards a People's Constitution

It is then that mention is first made in Chinese history of a national assembly by which a people's constitution was to be passed and arrangements made for a duly elected parliament. In answer to this proposed reform the representatives of the revolutionary provinces, constituting themselves a National Council, met in Hankow and drew up their own set of republican principles, the "Principles of Organization of the Provisional Government," a document revealing strong American influence in its strict separation of presidential and parliamentary powers.

For the time being radical sentiment was in the ascendancy, and the following year, when the emperor proclaimed his resignation, an enlarged National Council met in Peking and adopted a provisional constitution.

In this the powers of the president were subject to considerable restrictions. Yuan Shih-kai, provisional president, for the moment did not set himself in opposition to the popular tendency but busied himself with getting a loan from the Five Power Consortium. It was over the terms of this loan that dissension came, and T'ang Shao-yi, whom Yuan had accepted as his Prime Minister, left Peking. In spite of opposition from the radicals the loan was paid over to Yuan, and he was thereby in a position to turn on his critics. In 1913, having been made president for five years by the National Assembly, Yuan, by presidential mandate, denounced the *Kuomintang* as a seditious organization, turned its members out of the National Assembly and ordered it to disband.

Before the final split a revised provisional



constitution had been drawn up by a committee of the National Assembly. In this instrument again we can read a determination to minimize the president's powers. After the split, with his enemies discredited by an unsuccessful attempt to rouse the country to revolt, President Yuan promulgated in May, 1914 a *Hsin Yo Fa*, a constitutional compact, by the terms of which the president had powers to convene, prorogue and suspend the national legislature, and to appoint and dismiss all civil and military officers. In a word he

assumed very much the position contemplated for the emperor in the 1908 Constitutional Principles. In contrast to the provisional constitution, which had set forth a complete bill of rights for the individual citizen, freedom of speech, of belief, of assembly, of correspondence, this "Compact" laid down that these rights were subject to restriction by the law. One way and another the president was virtually in the position of a dictator.

Two later events are necessary to complete the picture. Yuan Shih-kai pro-



ALMOST SEVENTY-FIVE YEARS AGO  
*A Chinese court of justice in the year 1875,  
 showing the judge (centie) with his recorders  
 on either side of him*

could not be achieved with the acclamation which was necessary if it was to be achieved at all. He discarded the idea and three months later died. The episode revealed in surprisingly vivid fashion that there was political conscience alive which would not tolerate this *volte-face* on the part of the nation's governors.

#### Parliament of 1923

The other event occurred in 1923 and arose out of the continuance of the empty shell of parliamentary government. A committee of trained jurists, got together in 1912 in Peking to create the legal skeleton for the living body of the new republic, happened to be a persistent set of men. Whatever came to discourage them, they went on with their job in that patient, enduring way which has been so characteristic of good Chinese scholars. There was grave doubt as to the efficacy of the Constitutional Compact of 1914 its promulgation had been made on the basis of Yuan Shih-kai's prestige, and that prestige had proved unequal to the strain. The jurists, therefore, produced yet another instrument for the formal constitution of a republican order. The republican form of government was not to be subject to amendment, but the parliament, acting as a committee on the constitution, was to be competent to deal with the relations of the provinces to the central government.

Thus along with the solemn affirmation of China as an indivisible republic went the recognition that there were all sorts of federal problems needing to be solved. In this respect, as in a number of others, the document was much more realistic than the previous attempts to regularize things.

The matter being brought before the lamentable rump of a parliament in Peking in October, 1923, the proposed constitution was passed at a session containing a bare quorum of members. That the political

ceeded to turn his presidential position into a throne, expecting that his bewildered fellow-countrymen would feel that the form did not matter so long as there was the reality of authority. The military governors at the head of the provinces were his nominees, and Yuan thought they could be counted on to support the move. The majority did so, but not all. The Governor of Yunnan declared his independence, and popular disapproval soon manifested itself in the south. Within three months the president realized that his enthronement

disruption of the country and the evil reputation of the northern clique in control of Peking, made this formal action a mere source of cynical amusement throughout the country does not detract from the fact that the jurists had accomplished a very sensible constitution and that the fruit of their labours was thereafter on record.

The *Kuomintang* came to power in 1927 by right of a military procession of its armed forces from Canton to Peking. This demonstrated in unmistakable fashion that the country still remembered what had taken place in 1911 and 1912 and was not prepared to go back on that step. At that first revolution there had been a number of influential men including Kang Yu-wei the leader in the Hundred Days of Reform in 1898, who believed that a constitutional monarchy would prove more stable than a republic. At this second revolution it was clear that monarchism was dead. The live issue was whether the proletariat should assert its authority in what was acclaimed on all sides to be a 'people's country'. Alongside of this issue lay the other raised in the 1923 Constitution, namely, the extent to which the twenty-odd provinces of China should be subjected in the conduct of their affairs to the guidance or direction of the central bureaucracy. All classes in the country had been profoundly shocked by the exhibition that had been given of fratricidal disunity. They were prepared to put up with much if the principle of unity could be effectively established.

#### **Kuomintang One-party Government**

It was the force of this feeling which rallied behind the *Kuomintang* one-party Government and which enabled it to keep in power throughout the strains and stresses of the succeeding years. First there were attempts on the part of some old war-lords to assert their independence, attempts which failed. On the other hand, the Communist Party's armed opposition to the Central Government proved very difficult to suppress.

Here again we have to recognize the clock moving on. The question of a republic or a monarchy had been closed, now

the question of a proletarian party one wedded to a programme of radical agrarian reform, was presented to the country for its consideration. The issue has proved insoluble by force of arms, and today the northern half of the country lies at the mercy of the two opposing sets of armies, and the people become more and more distrustful of both claimants to rule.

#### **Education for Democracy**

The *Kuomintang* Government has all along based its right to govern in the one-party way on the principle laid down by the Leader, namely, that a period of political tutelage must ensue before the people as a whole can be expected to exercise their democratic rights in intelligent democratic fashion without jeopardizing the unity of the nation. During this period of tutelage it has been the government's prime duty not only to administer the country for the good of the people, but also to educate all classes in the proper expression of democratic opinion. The claim is made by the *Kuomintang* that they have discharged this duty and incidentally saved the nation from slavery under Japan. Actually, the Communist Border Government also has had its share in doing this and it is significant that it claims to have been more faithful to the Leader than his official representatives. Comparing the present with the recent past, the political clock has indeed moved on. Whereas time has shown the inevitable tendency in a one-party government towards fascism—none the less fascism because that government can buttress itself with a whole army of legal instruments—it has also shown that the will for real democratic government cannot be repressed. The ancient spirit of the Chinese people would seem to require room for this in the national polity.

This spirit has revealed itself in various significant ways since 1928. Thus the *Kuomintang* Government nine years later declared that the time had come to call together a national assembly representing all political parties. This assembly it was expressly stated, was to be the competent body for settling outstanding questions as to the powers of the parliament whose

duty it would be to interpret the will of the people to their executive officers and determine the powers of the provinces in the management of their own affairs. Further the Kuomintang Government found it advisable to constitute an advisory body called the People's Political Council in which not only the various political parties were represented, but also outstanding figures in different walks of life such as scholars, scientists, industrialists and agricultural experts. Whilst the meeting of the National Assembly, fixed for 1937, was prevented by the outbreak of war with Japan, the People's Political Council continued as an effective body throughout the war years. However, in the later stages of the war it ceased to be broadly representative of the nation as a whole, and in any event the Communists never took any part in its proceedings.

Recognition of this fact in 1946 caused the United States to put pressure on the Nationalist Government to bring the period of political tutelage to a close by the promulgation of a democratic constitution.

#### Cheng Chuan and Chih Chuan

Before the outbreak of the war with Japan in 1937, the Kuomintang Government introduced a programme of legislation dealing with every phase of the national life. The policy being that accepted by the party in 1925, there is, in theory, a careful demarcation of authority along two main lines. To the people as a whole or their elected representatives belong *Cheng Chuan*, the sovereign authority of deciding what government they will have. To the elected heads of the government belong *Chih Chuan*, the authority of ruling, in the sense of administering, of deciding on the measures to be taken for the country's good and giving effect to them.

Dr Sun's idea was that there should be four *Cheng Chuan*. (1) The nation as a whole was to elect a representative assembly which would designate certain individuals as the repositories of the people's authority. (2) On this assembly or parliament would devolve the duty of removing the individuals who proved themselves unworthy of the nation's confidence. To



GENERAL CHIANG KAI-SHEK

*His life has been a battle with the issue still undecided and even the goal uncertain*

this parliament also would accrue the duties of (3) laying down the general constitution, and (4) of initiating amendments to it. These are the four *Cheng Chuan* of the people. With regard to the *Chih Chuan*, the original programme allowed for five basic functions of governing: the executive, legislative, judicial, examinational (for the public services) and controlling (i.e. auditing of public accounts etc.).

On October 4, 1928, the Organic Law of the National Government was promulgated, embodying these principles. It was of course, significant that the nearest approach to democratic control was through the Kuomintang hierarchy of its representatives in council. It was their chief committee which gave the mandate to the government, they who elected the president and the heads of the different *Yuan* (*Yuan* ordinarily means a college, a body of colleagues with common functions and privileges). In Kuomintang parlance this

term refers to the five special boards which the party inaugurated, the Executive *Yuan* which in most respects the cabinet, the Legislative *Yuan*, the Judicial *Yuan*, the Examination *Yuan* for the Civil Service and the Supervisory *Yuan* a carry-over from the traditional Board of Censors. On November 17, 1930 this organic law was promulgated in a revised form, and this constituted the legal framework of the government. In 1930 the Legislative *Yuan* produced a civil code in three parts dealing with "general principles, obligations, and rights over things," and this code was passed by the State Council, a new body brought into being, sitting under the president and consisting of twelve to sixteen members, amongst whom ten were the presidents and vice-presidents of the five *Yuan* named above.

#### Chiang Kai-shek's Power

Actually this council did not function in the systematic way in which a *Yuan* did. It was there to deal with emergencies; for example, when the powers of two *Yuan* collided and a way out had to be found. It was, therefore more in the nature of a privy council, and the President its chairman, was little more than a figure-head in the country. The real power lay in the hands of the chairman of the Executive *Yuan* and the members of his committee. This was because the various departments of state were constituent parts of this *Yuan* the ministries of the interior, foreign affairs, military affairs, the navy, finance, communications (including railways), industry, education and health. This *Yuan* also controlled a number of special commissions, e.g. the Commission on Mongolian and Tibetan Affairs, on famine relief and on opium suppression. Thus the Executive *Yuan* has bulked largest in the minds of the people and has had a corresponding prestige and authority. Its chairman throughout the war years and for the most part before has been the Commander-in-Chief, Generalissimo Chiang Kai-shek. But the Legislative *Yuan*, from the long-distance point of view, is almost as important, as can be clearly seen in the light both of what has happened since 1911

and of China's legal history under her emperors, to which we shall return later on in this chapter. From these two angles of approach we can discern something emerging in the institutional life of China which is both modern and ancient in relation to law and government.

#### Need for Jurists' Work

The several attempts which have been outlined above to produce a constitution are open to serious misconstruction. The foreign reaction has been one of amazement that so much time and energy should have been spent in producing legal instruments which were so out of relation to the political facts.

But this view arises from ignorance of Chinese history and a failure to appreciate the vital factors in the situation. What alternative was there for responsible people but to go on looking for the best possible constitutional basis of agreement? Without a constitution, one which might take time to prepare and yet more time to become acceptable to the various political parties, what hope was there of a solution except by naked force? Even if some warlord should, as had happened before in China's history, win his way to the mastery of the country and proclaim himself emperor on what basis could he appeal to the loyalty of his fellow-countrymen? To go back to the old legal system would be impossible even the reactionary isolationist Manchu Court had come to see in the end that it must set its jurists to work on the modernization of Chinese law and political institutions. To attempt to set the clock back, as if China had no relations with Western peoples, would indeed have been unrealistic. The real question was not whether a revolution could be made more productive of good than a non-revolutionary method of procedure, but, since a revolution had taken place, how to get the country on to a new level of stable political existence.

To this there could be only one answer namely, through the will to unity under the more exacting conditions of modern statehood, plus the requisite common sense and intelligence for drawing up the



#### MODERN CHINESE CIVIL COURT

*There is a lapse of some three-quarters of a century between the photograph of a Chinese court on pp 310-311 and that of a typical Chinese Court today shown above. Here the judge and the clerk of the court are women for equality of the sexes is one of the ideals of democracy which China is in process of accepting.*

necessary legal instruments for without these latter the will to unity could avail nothing. Eventually the Chinese people have no option but to fall back on their jurists.

What, then, has been revealed is a considerable measure of competency on the part of the jurists, unproductive of the desired results so far; it is true, but making for encouragement for the future. This is true not only in the constitutional field, but in that of civil law also. In the nineteenth century and on into the twentieth, one of the most exacerbating causes of friction with the Western Powers was the failure on the part of the Manchu Government to make changes in its own legal system adequate to meet the social changes brought about by the opening of China to new commercial and cultural influences. There was no far-sighted statesmanship about the court's attitude, whatever there

may or may not have been about that of the Western Powers. Yet in the end the Manchus had to give way not merely to the pressure of the West but also to the growing force of modernism in China itself. The result was as we have seen to set jurists to work on every phase of social life and the gradual building up of new codes to meet the requirements of the modern social economy.

#### Modern Laws

These new laws and regulations were collected in the revised *Ssu Fa Li Kuei*, an official publication of the old Ministry of Justice. A revised edition in two large volumes was published in September 1922, and four supplements were published respectively in 1924, 1925, 1926 and 1927, making a total of 2,953 pages in small print. These compilations contain laws





#### URGE TO LEARN

*In awakening China, where millions are poor and cannot yet read, but where the desire for knowledge is great, the artist's brush must teach and preach.*

passed by parliament and regulations issued without that sanction, for the most part the latter. Among them are laws dealing, for example, with forests (1915), copyright (1915), stock exchanges and chambers of commerce (1914), an amendment of the Criminal Code (1914), and nationality (1914), and the regulations as to mining enterprises (1913), expropriations of land for roads (1920), trade marks (1923). It is obvious that all these were matters urgently needing definite action. There were sections headed "Civil Law," "Commercial Law," "Criminal Law," "Procedure Civil, Commercial and Criminal," "Nationality and Application of Laws," "Judicial Organization," "Administration," "Martial and Prize Law," and "Legislation

concerning Cases to which Aliens are Parties." There was also a section headed "Police," for the rise of the new urban centres entailed the creation of a new kind of trained police force exercising new powers of control.

The committee of jurists assembled in the Ministry of Justice in 1912 became a Law Codification Commission in 1918 with the Minister of Justice, Hu Han-min, for its chairman, and later Dr. Wang Chung-hui (subsequently a judge of the Permanent Court of International Justice at The Hague). This was the body which did the work until 1928, when the new National Government constituted the Legislative Yuan, which then took over the labours of the commission. Since then there has been a continuous succession of promulgations. The most outstanding acts of legislation have been in relation to the Civil Code, of which Book I, General Principles, Book II, Obligations, Book III, Rights over Things, Book IV, the Law of the Family,

Book V, the Law of Inheritance, were all published by the end of 1930. Specific acts were promulgated in relation to trade marks (1929), factories (1929), and labour disputes (1930).

It must suffice here to point out three striking features of the Civil Code (1). It is much concerned with maintaining the rights of the individual citizen, yet his obligations are placed first and clearly take precedence over the former in order of importance. Here we see the influence of that basic element in the Chinese social and ethical tradition by which a man or woman is not regarded as an unattached unit but as a member of a family. But there is a double emphasis now, on society as a whole as well as on the family. (2) In Book

III dealing with Rights over Things, the Code preserves old-established customary rights, such as the right to pick up sticks and cut grass on private land, it forbids the owner to fence in his land or otherwise prevent ingress and egress. It goes on to declare that the exercise of a right must be "in accordance with the rules of honesty and good faith" (3) The first article of the Code lays down on the one hand that "In civil matters if there is no provision of law applicable to a case, the case shall be decided according to custom, and on the other that If there is no such custom, the case shall be decided in accordance with the general principles of law."

#### Custom and Law

These law-makers were in the position of men legislating for a changing world and having a lot of leeway to make up. They were not prepared to throw over time-honoured custom. On the contrary, they were anxious to use it. Yet the primary intention of the Code was to supersede custom and it is significant that Article 2 reads as follows: "A custom is applicable in civil matters only when it is not contrary to public order or good morals. This was in keeping with Chinese tradition, for Chinese customary law from its very early days recognized the existence of hard cases to which a general law could not apply without doing injury or causing injustice; it would, that is to say, take circumstances into account. None the less, a revolution is concealed in these two articles: for custom is no longer king, and in the last resort the appeal is not to basic ethical principles as stated in the Confucian Scriptures, but to the general principles of law." This expression can only refer to the general principles recognized by legal experts the world over, by experts versed in Western more than in Chinese jurisprudence.

In the same way the influence of Western law is discernible in the *Kuomintang* legislation with regard to labour and factories. There is the same sense of a rapidly changing order of society for which new laws must be established without delay. That the experience of the more industrial-

ized nations should be called on is assumed as natural and inevitable. At the same time with so wide and diversified a field of experience to draw from, there has been the opportunity for selection.

#### Labour Legislation

In the case of trade unions and labour disputes it is noteworthy that employers may not be forced to employ only members of the union concerned; neither may they discriminate against union members. Careful arrangements are made for the functioning of conciliation boards and, where they fail, for arbitration boards. Strikes and lock-outs are not forbidden, but are hedged about with severe restrictions. In other words, the State through the local "competent authorities" is recognized as having a preponderating stake in these matters, and action to the detriment of the public is not to be allowed. Thus workers in state institutions, including state industrial enterprises, have no right even to form a union.

Western influence is also evident in the Factories Act. Faced with the need for mitigating the evils of brutal child labour, excessive hours and bad conditions of work and unguarded machinery, the Legislative Yuan produced an act which for care of the workers' interests can compare with most factory acts in other countries, but which did not make provision for regular inspection. All that was required was that factory owners should furnish every six months to the proper local authority a detailed record concerning all the workers in their employment and their terms of work including accidents, sickness etc. There was, therefore, an absence of teeth about the Act, and its effect was further diminished by the provision that in certain circumstances, described vaguely as *force majeure*, the prescribed eight-hour day might be extended to twelve hours.

The *Kuomintang* Government found itself embarrassed in putting this Act into effect owing to the existence of the extra-territorial rights of the authorities in the foreign settlements. Since the two chief factory areas were Shanghai and Tientsin, where a number of foreign-controlled factories worked under foreign jurisdiction,

there was a difficulty which could only be overcome by international negotiation. The negotiations were opened, but no agreement was reached, the foreign owners being unwilling to agree to the terms of the Factories Act until they were assured of bona fide inspection of factories in the Chinese areas and the strict enforcement of the law. With the relinquishment of extra-territoriality during the war years this difficulty has now disappeared but it would seem that this Act and even the modern codes are only intermittently enforced on account of the disturbed condition of the country.

#### Bureaucratic Developments

During the war years the *Kuomintang* Government continued in power and the continuance of the "tutelage" regime meant that no fundamental change took place in the constitutional situation. There were nevertheless some remarkable developments. The exigencies of the war, entailed an increased bureaucratization of administration for without central direction the national resistance could not have continued. Thus the problem of provincial powers as against central government powers was solved on the temporary basis of the national emergency. One vital factor at work was the existence of the prodigious armies which were built up by conscription and which operated on nine different fronts (The total number of men under arms was estimated at about seven millions.) Whilst the provincial governments still conscripted men for the provincial militia the presence of central government armies in the provinces meant the existence of an authority which no provincial administration could withstand.

Complementary to this development came the unforeseen development of a special psychology in the nation's leaders and administrators. The fact that the national crisis and the period of "tutelage" coincided in time meant that not only was the *Kuomintang* in command but also that there was no possible alternative to it. The result was a tendency in the government to resent all criticism and to take measures against the critics. A body of secret police

was organized under General Tai Li and secret detention camps were formed. Outspoken people disappeared and were not heard of again. Along with this came a more and more rigorous control of universities and schools, espionage amongst teachers and students, and orders from the Ministry of Education putting all education into a strait-jacket.

That "tutelage" should automatically entail certain interferences with the republican citizen's right of free speech, free assembly and free printing had been recognized as part of the price to be paid for the time being for the leadership of the *Kuomintang*. But the country was not prepared for these lengths for measures taken entirely apart from and alien to the work done in the Legislative Yuan. Public opinion, stirred also by an accumulated list of maladministrations by *Kuomintang* officials, became restive. The result was the issue of an order from the Executive Yuan in 1944 by which the right of *habeas corpus* was guaranteed for the first time in Chinese history. By the terms of this order an arrested man had the right to have a formal charge made against him within a certain period and to have his case tried in an open court.

There have however been persistent rumours since that this pledge has not been consistently honoured.<sup>1</sup>

#### Democratic Constitution

As has been mentioned above the Nationalists, acting under American advice introduced a democratic constitution under which elections for a National Assembly were held in 1947. It is not yet clear however how far this new constitution is an effective reality for in Nationalist China all rival organizations to the *Kuomintang* are firmly suppressed, whilst membership of the Communist Party is a crime. This is scarcely surprising for civil war persists, and at the time of writing (March, 1948) practically the whole of Manchuria and wide areas of Northern China are in Communist hands whilst the remainder of the country is facing

<sup>1</sup>The Central Government has during 1946 and 1947 repeatedly demonstrated that it does not at the present moment regard itself as bound to observe this pledge.

a breakdown, economically and politically

So far we have considered the recent history and the nature of the institutional revolution which has taken place in China. It must be clear to all students of politics that the removal of the Son of Heaven the linchpin in the intricate structure of government, would entail a radical rearrangement in the system of checks and balances which large-scale administration involves. It is also clear that such a rearrangement cannot be made without a painstaking use of trial and error, and that this is pretty much what has been done since 1911. There is reason to believe, however, that the people of China still hold to the belief that they can achieve political unity on a democratic basis.

#### Traditions of Government

What foundation is there for this belief? Primarily there is the realization of their common culture, their distinctive customs, their distinctive moral consciousness, their distinctive reverence for learning, their distinctive poetry and art. This realization is stronger than ever throughout China's previous history. China is consciously nationalistic today, conscious also of her great tradition in government, and her ability in the past to weld together peoples of very diverse origin to take all sorts of foreign influences, religious, philosophical, artistic, economic, social, and put her own hall-mark on them so that they become part of the institutional pattern of the country. To complete the picture, therefore, of law and government in China it is necessary to go back to that long past and estimate the part which law played during the formative epochs in her history.

There is a general impression outside China that her traditional form of government has been that of an autocracy without constitutional safeguards of the people's rights. There is much which confirms this impression, notably the imperial title, "Son of Heaven" and the commission from Heaven which he was supposed to have. Court procedure and language at times even made the autocracy look like a theocracy. When, however, we go back to the early history of the Chou Ch'in and

First Han eras (eleventh to first century B.C.), we find some very significant data to the contrary. These were the centuries during which the Chinese people emerged from tribal conditions into feudal, experienced the breakdown of that system, were reunited by a military dictatorship and finally developed a central bureaucracy with powers to control its subordinate regional governors. It was during these centuries that the distinctive Confucian culture took shape and came to be recognized by ruler and subject as the embodiment of divine and human wisdom, and it is in the Confucian bible, the Confucian Classics, as they are called, that we find evidence of a constitutional basis to the Chinese State.

Two main features need to be stressed: the filial piety doctrine of the state and the right of the emperor's subjects to rebel against him if his rule should prove to be detrimental to them. The two principles are closely interrelated.

#### Duties of a Ruler

The filial piety doctrine though rooted in primitive ancestor worship became a whole philosophy of man and of his chief end in life. That end was to serve his parents while they were alive to mourn them when they died and thereafter to sacrifice to their spirits. Here lay the categorical imperative for every man, woman and child—a lifelong series of duties which took precedence even of loyalty to the sovereign. In fact, the sovereign's prime duty was to be an exemplar of filial piety and thereby encourage all his subjects in the discharge of these sacred duties. Since *pu hsiao* (unfiliality) is the grossest of all natural crimes, even imperial ministers of state must serve their parents first.

Of course, since a filial son must devote himself to extending his parents' reputation and the emperor could ennoble a meritorious subject's ancestors, there was room for casuistry in the matter. For instance, in Confucius' day (551-479 B.C.) one reigning duke informed the sage that in his part of the country if a man stole a sheep his son informed on him, regarding this



STREET PARADE IN CANTON

*This picture of young China calling on the people to make intensified effort in their war with the Japanese is characteristic of the long years of pain and battle—the clash of divergent*



#### CENTURY OF STRUGGLE FOR CHINA

*aims and wills, which China still experiences. The invader has been defeated, but the social form of the new China remains in doubt, and bitter and intense fighting brings no conclusion.*

as a matter of moral integrity. Confucius in his reply made clear that this was not his idea. There have, indeed, been recurrent attempts to exalt duty to the emperor above that to parents, but the filial piety dogma retained its high religious authority right down to modern times.

#### Crime and Punishment

The other constitutional feature was in the nature of a right rather than a duty. According to the Confucian view there was a pact between the ruler and his subject, that he should govern for their good. Heaven was a witness to the pact, and, if it was not kept, Heaven sent down calamities. The order of nature was deranged, and the nation as a whole suffered. In such circumstances, when, for instance, a drought made it impossible for sons to provide food for their aged parents, they had a right to criticize the regime, to agitate for reform, and in the last resort to rebel. As one passage in the Confucian Classics puts it, "Heaven hears and sees as my people hear and see." This was applied to the emperor's ministers and the whole gamut of government servants as well as to the emperor. They were his 'hands and feet,' and if they betrayed their high charge, they were not only disloyal servants subject to punishment for their misdeeds, they also earned the hatred of Heaven's people and cast dishonour on their parents.

The existence of these two rights and their corresponding duties does not, of course, entail the existence of a democratic spirit. It does, however, explain the deeply embedded idea that well-being on the national scale is primarily a matter of achieving that natural, easy-going unity and concord which is the basis of family well-being. And this explains that hortatory, educational, positive function of government to which reference has been made above. There was no urgent need for the government to protect the private rights of citizens, for everyone was a member of a family or clan and could look to it in time of need. From family loyalty and discipline sprang the systematic use of arbitration, and in consequence there was no such separate development of civil law as we

find in the history of Europe. But it is a mistake to think there was no civil law in China. The *Three Classics of Ritual* are a mine of information on the regulation of personal relationships between individuals and it was on the principles there enunciated that arbitrators and official judges and the later codes based their decisions.

On the other hand, this philosophy of the state and the individual does not explain what has been described above as the negative side to government—the punitive element. In the Confucian Classics there is any amount of evidence as to the existence of this from the earliest days. The legends of the Sage Kings of antiquity emphasize that although they ruled by power of example, yet they were not able to dispense altogether with penal laws. Thus in the *Shun Tien* we find this in regard to the great and good Emperor Shun (2255-2207 B.C., legendary date):

(Shun) delineated the five type punishments, along with banishment as a mitigation of these. The whip was to be used in punishment by officials; the stick for admonition; money for redeemable offences; inadvertent offences and those caused by misfortune were to be pardoned; those who offended presumptuously or repeatedly were to be punished by death.

#### From Feudalism to Imperial Autocrat

This account is, of course, coloured by Confucian theory of a later date. Coming to the historical facts, it is clear that in mid-Chou times there were in addition to traditional forms of execution these five punishments: branding on the forehead, tattooing on the face, amputation of the nose, amputation of the leg above the knee-cap, and castration. There is some evidence that these were regarded as acts of mercy, being mitigations of the supreme penalty, and that the idea behind them was that of a deterrent to further crime rather than public vengeance. But the main fact to note is that in this age began the practice of publishing in writing what the authority took to be crimes and what the punishment for each would be.

The practice grew rapidly and in the last two centuries of the Chou era there were statesmen who insisted that Confucius' ideal of government by moral influence was nonsense: that the only efficient way for society to carry on was by mobilizing all classes for the two basic industries of agriculture and war, and to stimulate the people by fixed rewards and punishments. Thus arose a school of political realism known in Han times as the Legalist School.

#### Revival of Confucianism

To understand the influence of this school we have to realize that the Chou feudal order had been crumbling for some time. Confucius and his disciples, from the fifth century B.C. onwards, tried to buttress it with their humane philosophy, but in vain. The trend was irresistibly in the direction of independent states competing with each other for regional mastery, and in the last resort for lordship over China itself. Government by the unwritten law of custom and traditional loyalty became increasingly ineffective, systematic administration by trained officials with well-defined powers, increasingly important. More than one minister advised his lord to abolish the feudal aristocracy with its ancient privileges and exemption from the law. In one state, that of Ch'in, this was done, and this state eventually conquered the other states and established the first imperial regime (246 B.C.). That regime lasted for forty years, time enough for the obliteration of many old political landmarks. The First Emperor was an autocrat by temper and by principle. His hat was law; his method of administration bureaucratic. He prided himself on making known to all precisely what actions would be rewarded and to what extent, and precisely what actions would be taken as contumacy and what the penalties would be.

In the succeeding era, that of the Han emperors, in which the whole of modern China plus part of Annam came under Chinese rule, there was a revulsion away from the more savagely vindictive features of the First Emperor's system, and by the latter half of the second century B.C. the Confucian theories of the state and society

were once more in the ascendant. Thus the positive side of government was stressed in a way which has never since failed to influence emperor or conqueror. It is, however, a mistake to suppose that the *Cheng* principle of government (see page 313), with its tendency to *laissez-faire* in administration, functioned without the *Chih* principle with its tendency to bureaucratization and its severe penalties for anti-social acts endangering the peace. The first Han emperor at the beginning of his reign denounced the tyranny of his two predecessors, but it was not long before he decided that mildness did not pay. Thus his minister, Hsiao Ho, made a collection of the First Emperor's laws, and, selecting those which were in keeping with the times, made a code in nine parts.

#### Legalist Controversy

Throughout the dynasty there was a periodic struggle over the need for severity or the reverse. Ultimately there was a code of sixty sections and the monograph on criminal law in the *Earlier Han History* states that in the six reigns from 86 to 81 B.C. in an average year there was one execution to every thousand of the population and other punishments to three times that extent. The upholders of mildness maintained that the penalty of wearing a special criminal's garb was enough, but the martinets won the day. The controversy centred round the efficacy of the death penalty as against mutilation or such lesser penalties as imprisonment and fines. Sincere Confucianists repeatedly maintained that at any rate old people of eighty years and very young children should not be made to suffer the rigours of the law, but they were not on the whole successful in their appeal. Nevertheless, they succeeded in keeping the prime Confucian principle to the fore. "If you try to lead the people by regulations and to order their life by means of punishments they will try to avoid them without any sense of shame. If, however, you try to lead them by your own moral power and to order their life by means of ritual courtesies, they will have a sense of shame and become right of themselves." (*Lün Yu* II 3)





#### CHINESE TOWN HALL

*The entrance to the magistrates' hall in the centre of a typical Chinese town. The magistrates' hall corresponds closely to the English town hall, and is the centre of local government.*

The truth is that although legalism as a social philosophy was discredited, the main legalist books survived, and we have evidence that they were read. E.g. in 79 B.C., the Grand Secretary of State, in meeting a deputation of dissatisfied country literati, said quite frankly that from the administration's point of view there was a good deal to be said for legalist practice: it produced results.

There can be no question but that during the four centuries of the Han era the negative side of governing dug its way deep into the constitution. Also there was then laid the foundation of that Ministry of Justice which first appears four centuries later. Judicial procedure was worked out and appeal courts set up in the capital. On the other hand, with Confucianism the state religion and education predomin-

antly, in the hands of men versed in the Confucian Classics, the army of officials consisted of men trained in a social philosophy which was alien to the legalist one. So long as the religion of the family maintained its power, legalism could not exercise influence beyond a certain point. Within the range of that influence it was strong: the mechanical trend was to have more laws and more formal procedure for the administration of justice.

#### Age of Great Divisions

The four following centuries were an era of division. This was known as the Six Dynasties Period, for a dozen regimes arose in different parts of the country with varying extent of dominion. The north fell under the sway of Tobas and other non-Chinese, and with the migration of many of

the great scholar families to the south, there was something of a return to feudalism in those parts. The southern emperors for the most part had unstable thrones, and the "king's wit" did not run very far. The northern emperors, however, had to rule two classes of subjects, their own people and the Chinese. Thus they did by institutions which embodied two sets of laws. There was, therefore, a keener consciousness of law in the north than in the south. The significance of this emerges in the next period of unity. The Sui emperors (A.D. 590-620), followed by the first emperors of the great T'ang Dynasty (620-907) were under northern influence. Thus a *Hsing Fa P'u* (Ministry of Justice) was established and in other ways the Han legal tradition was confirmed and developed.

#### Development of Civil and Criminal Law

Among the six colleges set up in the capital for the education of public servants there was a college of law, and in keeping with this there was a special degree given by examination on the principles and practice of law. In the revised version of the *T'ang History* the monograph on law specifies four books of coded law under the titles of *Lu*, *Ling*, *Ko*, and *Shih*. The *Ling* decrees are defined as the setting forth of the different classes in society and the institutions pertaining to the State and the family, the *Ko* (state regulations) as the setting forth of the unchanging duties of the different grades of officials, the *Shih* (patterns) as the setting forth of the *ku* (? constitutional laws) which it was the officials' business to maintain. In the view of the author Ou-yang Hsiu, government consisted in the "transaction of business in accordance with these three." He did not define the *Lu*, but enumerated them in twelve parts: (1) a list of names (for breaches of the law), (2) protective prohibitions (i.e. in relation to the armed protection of the country); (3) the organization of officialdom, (4) households and marriages; (5) stables and storehouses; (6) sedition, (7) thefts and robberies, (8) quarrels and litigation; (9) fraud, (10) miscellaneous laws, (11) the arrest of

evaders of justice (12) the assessing of penalties. Here then is clear evidence of civil as well as criminal law, as also State regulations for the management of the civil services.

Step by step there was coming into being the famous state-examination system with its basic Confucian principle of "selecting the worthy" for the high task of rectifying and controlling (*cheng* and *chih*). The officials, from now on, men more and more versed in the Confucian Classics, were not only "the servants of the king," but also the guardians of the Great Tradition. In constitutional theory the emperor could promulgate whatever decree he thought for the good of his people. In practice he could hardly avoid consulting the constitutionally appointed advisers surrounding him, and although the lower provincial officials and the common people had no direct approach to the throne the chief provincial officers had not only the right but also the duty to present memorials to the throne. Also, running athwart the intricate machinery of imperial administration, there were the "cross-bow investigations" made by a separate and somewhat aloof department of state known down the ages as the *Yu Shih T'ai* (Controlling Record Office). The duty of this censorate, the members of which were often called the "eyes and ears" of the emperor, was to discover all abuses of authority of whatever kind. In time a sacred aura gathered round the presidents of this department, since theirs was the vital and dangerous task of censuring the Son of Heaven himself for acts of misrule. During the T'ang centuries the department was enlarged and three sub-departments were organized.

The Sung era (960-1280) saw no great changes in law and government, remarkable as it was for its philosophy, poetry and art. The Mongol rule which succeeded it had somewhat the same effect as the northern dynasties eight centuries before with the irruption of alien peoples. From this sprang again a heightened consciousness of the place of law in the conduct of State affairs. This we can see at work in the Ming era (1368-1643). At its inception there was a scrutiny of the existing body

and procedure of law and a reaffirmation of the Chinese tradition, but not without a revision of the codes. Case law was recognized and outstanding judgments of the appeal courts were embodied in the codes.

The final monarchical era, the Ching or Manchu as it is sometimes called (1644-1911), carried this new tendency further as has been hinted at the beginning of this chapter. Copies of the *Ta Ching Lu Li* (1740), there referred to, were dispatched to all the county heads for their guidance in administering justice. It was itself a revised set of codes and included over a thousand new articles. One of its chapters was devoted to comparison of outstanding judgments. In the same year there was also published a detailed geography of the whole empire in which were included details as to the boundaries of administrative divisions, configuration, products, industries and population. Most significant of all, about every forty years during this era there was an official revision of the legal codes with additions and deletions.

#### A Comparison with Europe

Thus we return to modern times and view the twentieth-century changes in historical perspective. In the light of that perspective it is incontestable that the Chinese people having early had a vision of the benefits of political unity, made considerable efforts to achieve, maintain and reinstate it. In this they have been not unlike the people of Western Europe, even in regard to the institution of the law. The Roman Empire gave a vision of unity to the West, and after it fell the idea survived, the Holy Roman Empire came into existence and survived, as an ideal at any rate, until the Napoleonic wars. To the first Chinese students of later European history the picture which they gained of its various feudal systems in process of decay and its constant outbreaks of chauvinism had its counterpart in their own history in the last centuries of the Chou era, the time when they had not yet achieved unification. Kang Yu-wei, the constitutional philosopher of forty years ago maintained that the white race demonstrably had not within it the power of achieving unity on the scale necessary for

its own well-being and that of the world. For him there was a challenge to the Chinese race to put their own house in order and show the world what political unity under the rule of law really meant. He died a disappointed man but his vision of a league of nations survives in his famous book, the *Ta Tung Shu*, which was curiously prophetic in its detail of the organization set up at Geneva.

The realistic study of the history of China would appear to show that Kang Yu-wei did not talk mere idealistic nonsense. As an experiment in government on the large scale the Chinese traditional state has clearly its particular significance the more so perhaps because the law has played so large and yet a different part in that experiment. Whether the Chinese people will be able to fulfil the role which Kang Yu-wei envisaged for them is, of course, a question one which it is not within the scope of this chapter to attempt to answer. It is however, relevant to estimate the factors in the situation.

The obviously important factor is the deep-rooted belief of the Chinese that they can carry on with their colossal state and that they have the requisite political wisdom to adapt the machinery of government to the requirements of the present situation. To this belief the common foreign reaction has been grave doubts both as to any Chinese flair for unity and as to their legal common sense in modern times. The galling suggestion has even been made that the typical Chinese citizen only works well and keeps the peace if he is ruled, suavely it may be but firmly, by a government imposed on him from above so that the revolutionaries were deluded when they started the country on the democratic way.

#### Unwritten Constitutions

The trouble about this form of criticism is that the critics work from an uncritical knowledge of Chinese history and even of the history of Europe. For example the question of what constitutes a political constitution cannot be answered only in terms of modern developments in the West. We have to go back to the unwritten constitutions which have been no less

effective in their time. It would appear that the problems with which the natural-law philosophers Grotius, Suarez, Hobbes and the rest, struggled were in many respects the same as those about which the early Chinese philosophers argued, and that out of that early battle of minds emerged an understanding of the rival claims of authority and freedom. The evidence for this lies in the Confucian Classics which, it cannot be too strongly emphasized, only slowly won their way to their sacrosanct position. Once they had won their way, there was the constitution of the Chinese State, first set up in Han times and developed ever since on the double basis of reciprocal rights and obligations as between governor and governed. This relationship cannot be consolidated in any other way than by the institution of the law and the history of China goes to prove this in its own way just as the history of other countries proves it in their ways.

History however also proves that without the positive side of government the negative side fails to achieve the higher ends of government. However well suited the laws and however incorruptible the

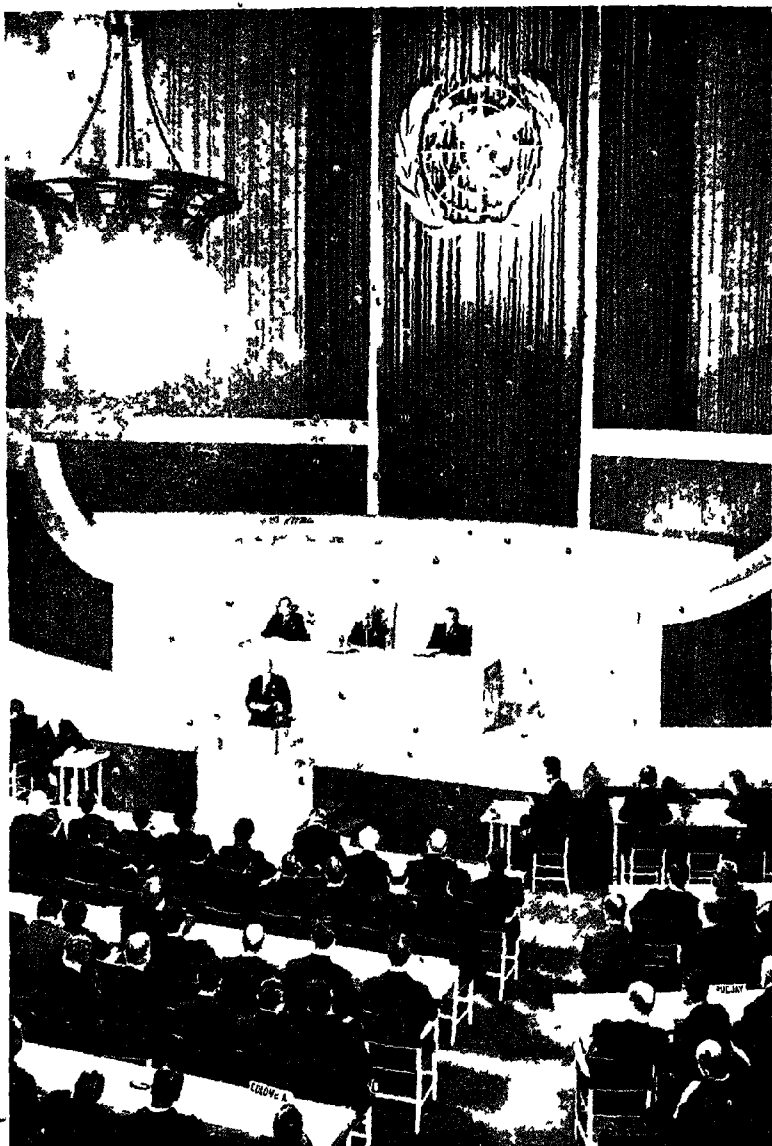
administration of justice may be, economic rivalries will destroy unity. The famous eleventh-century Confucianist, Qu-yang Hsiu, put the universal problem in discerning fashion. 'In ancient times those who established states made up their minds about the facts with a view to organization but they did not specially invent laws, nor so frighten the people that they learnt to quarrel over small matters. Later generations made books of penalties being afraid of them being incomplete and so the people be ignorant of what they should avoid. In making laws of whatever kind (later rulers) gave their minds to this that in all respects the people might avoid breaking the law. Thus where they did not know how to lead the people by virtue and order their life through courtesy and forbearance, they would yet set them moving over into goodness and giving a wide berth to crime without being conscious of so doing.'

This Chinese philosophizing may be wrong in point of history, but further considered, it is surely right in principle whether for the Chinese people or the other peoples of the world.

### Test Yourself

1. Mention two contrasting elements in the traditional Chinese idea of the function of government.
2. What was the government that the Revolution of 1911 upset?
3. Who was the leader of the Revolution of 1911?
4. What is the Kuomintang?
5. What is the doctrine of tutelage in the present Chinese system of government?
6. What was the Chinese state examination system?
7. What have been some of the important effects of this system?
8. What is the doctrine of filial piety, and what has been its significance for Chinese government?

*Answers will be found at the end of the book*



#### U N O ASSEMBLY AT CENTRAL HALL WESTMINSTER

*The United Nations Organization replaced the League of Nations in the second attempt in less than thirty years to place world relations on a peaceful footing. Above: Mr. C. R. Attlee, Prime Minister of Great Britain, addresses the opening assembly of U N O in 1946*

# INTERNATIONAL LAW AND INSTITUTIONS

So far this book has been concerned with the systems of law and government of particular states. We now have to examine how far these national systems are co-ordinated in any wide scheme of organization.

In the world today government is a matter for each nation, it is carried on in about sixty different states, each with its own territorial boundaries, and each claiming to be independent of outside control, claiming, as we commonly say, to be a sovereign state. There is nothing which can properly be called an international government, though we shall see that there are some international institutions which do to a limited extent serve as a substitute for one. It seems likely, too, for many reasons that government will continue to be in the main a national responsibility, even if states are induced as it is to be hoped they may be to give up some of the wide liberty of action that sovereignty has traditionally implied, in the modern world that has become a dangerous anachronism. But sovereignty is an ambiguous word which has had many different meanings in the past, and states will no doubt continue to claim it, even if its meaning is modified again. In any case the practical question is not one of words, but of the ways and means by which international relations can be put on a better basis.

## No Easy Formula

For that there is no simple formula. A single system of law and government may seem an attractive ideal, but the difficulty of this way out is that the world is too vast and its peoples too different for that to be desirable even if it were practicable. Good government depends upon the presence of a genuine feeling of community among the governed, and no such feeling can develop

when the area of government is too vast and consequently the interests which it has to serve are too diversified.

Even a federal world government, not superseding the national governments but only exercising certain limited powers reserved to it by a world constitution would require a much closer integration of the peoples of the world than seems at all likely to be realized for ages to come and federation on less than a world scale, whatever may be said for it on other grounds, would not solve the international problem. It would only change the form and the number of states, leaving the difficulty of co-ordinating their relations with one another much as it is today.

The fact then has to be accepted that there is no short cut to an orderly world. Clearly, however, that must be the ultimate goal, and already some steps have been taken towards it though they have not gone very far. For there are as has just been said some international institutions which fulfil for the whole body of states, though as yet only very imperfectly, some of those functions which governments perform for individual states.

## The Rise of International Law

One of these institutions is the system of rules for the conduct of states which we call international law or the law of nations. This had its origin in the fifteenth and sixteenth centuries, when the modern state system was being formed and like that system it assumes the independence of states as its fundamental principle. Of course, there were rules and customs which states observed towards one another earlier than this, there has been something which we can, if we like, call international law ever since there have been nations. But there were historical causes which prevented it from developing earlier in the form in

which we have it today. The Middle Ages thought of the whole of Christendom as a unity, states were not separate and independent; they were members of a larger whole. Of course, that unity was never an historical fact, the several parts of Christendom were often at war with one another and the ecclesiastical and the secular powers constantly disputed over the authority which each was entitled to exercise inside the states. None the less, so long as unity was the universally recognized ideal, so that men felt that the facts ought to conform to it even if they did not yet do so, a system founded on the principle of independence could not even begin to develop.

#### "Law of Nature"

The Reformation shattered the medieval ideal of unity, and it did so just at a time when some bond between states was becoming more necessary than it had ever been. The Age of Discovery was giving a new impetus to international commerce, the Renaissance had made thinking men more conscious of the common background of European civilization, scientific method and invention were awakening a new interest in all these things made it impossible for men to believe that the complete separateness of states, to which political events seemed to be pointing, could be the final basis of their relations. If those relations were to make sense, some substitute had to be found for the lost ideal of the Middle Ages.

Men turned to law for the answer, and in the mental attitude of the time that was inevitable. For the Middle Ages had a view of law which has become unfamiliar to us today, or at any rate they expressed it in language which we no longer use. They believed that law pervaded the whole world, both physical and moral. God had intended His world to be a system of order and it was impossible to believe that He could have intended that states should be an exception. For all their newly recognized independence of one another and despite the fact that secular rulers had now become undisputed masters in their several states, the nations must be bound

together by law because it was part of the order of nature that they should be.

Now whether or not we speak of a law of nature as the Middle Ages did and as Greece and Rome had done before them, we cannot avoid some such assumption if we try to explain why men have a duty to obey the law, not international law only but any kind of law. Today we should probably express the duty of states to obey international law in some such terms as these. It is true, we might say that states are independent, that each has a government which is not subject to the authority of any other state or group of states. Yet no state exists alone. It is constantly being brought into all sorts of relations with other states, and it cannot help demanding that these other states should behave or not behave towards itself in certain ways and recognizing in return its own equal obligations towards them. Thus to say that states are independent is only part of the truth; it is equally true that they are interdependent, and their interdependence is the basis of international law. For that law is simply the sum of the rights which states have gradually come to expect that other states will recognize, and of the duties which they themselves have come to recognize as inseparable from those rights. In ultimate analysis its binding force is exactly the same as that of any other kind of law: law is binding because man, in so far as he is a reasonable being, is constrained to believe that order and not chaos is the governing principle of the world in which he has to work and live.

#### The Modern System

The rules which make up the modern system have a twofold origin. Some of them are based on customary observance, and others come from the treaties which states make with one another. 'Custom', however, when lawyers use the term means more than a mere habit or practice; it means a habit or practice which is obligatory, followed, that is to say, by an individual or a state as the case may be, not from mere choice or convenience, but from recognition of a duty to act or not to act in a particular way. Hence when the ques-



#### • PACT FOR FIFTY YEARS IS SIGNED

*Treaties correspond to the contracts of private law, generally they are drawn up according to a fixed plan, with an article providing for ratification by the government's party to the contract. Above, M Bidault and Mr Bevin, Foreign Ministers of France and Great Britain sign the Dunkirk pact, a treaty of mutual aid.*

tion arises, as it often does, whether or not a state is *legally* bound to behave in some special way, the international lawyer has to inquire whether there is evidence in the general practice of states to show that they have recognized a binding rule to that effect, and this is often a difficult question to answer. But the difficulty is not peculiar to international law, it occurs in any society which is at an early stage of legal development as the society of states still is. Customary law in fact is a primitive kind of law, and in progressive societies it is superseded by more satisfactory forms of law, by law enacted by legislatures, and by law built up out of judicial decisions. This has not happened in international law, because the society of states has no legislature, and its courts have not yet created a substantial body of judge-made law,

though they are beginning to do so. Customary law, therefore, is still an important element in international law, but it is beginning to be overshadowed by the rapid growth of the second element in the system that of treaty-made law.

#### Treaties

Treaties correspond to the contracts of private law, and like contracts they create binding rules only for the states that are parties to them. But despite this serious limitation on their usefulness, treaties play a role in the international system which is more important than that of contracts because, in the absence of a legislature, a multilateral treaty, that is to say, one to which a large number of states are parties, serves as a sort of substitute for legislation. For instance, it is by multilateral treaties



that great international institutions like the League of Nations and the United Nations are brought into being, and that international collaboration is organized in the social or economic or other fields. In short, treaties, besides their ordinary use as contracts between states are the most useful, in fact almost the only, instrument which we have for the improvement of international law.

There is a traditional division in the subject matter of the law into the law of peace and the law of war and we must consider shortly the purposes which each of these is intended to serve. The doctrine of independence has always narrowed the field of operation of the law of peace. That part of the law has had to confine itself to acting as a sort of framework, within which a number of equally independent states can exist together in the same world; it tries to mark off from one another the spheres within which each state shall be free to do exactly as it likes. Thus much of it is concerned with questions such as how the territory which belongs to a particular state is to be determined, what the limits are to a state's powers in its own territory, what rights it may possess over the sea or the air, what reparation it may claim if its rights or those of its subjects are infringed in another state.

#### International Organizations

These are only a few examples of the kind of question to which the law of peace gives us the answer, but they will serve to bring out a fundamental characteristic of the whole system. The restraints which international law has hitherto imposed on the freedom of states to act as they like are slight; they are the minimum that is necessary to protect the equal rights of other states. It has not yet been allowed to develop, as law has done inside most modern states, into an instrument for promoting the well-being of the whole community. There are a few beginnings of such a development, as we shall see, but the obstacles in the way are great. An international law which had the common welfare of states for its aim would require a deeper sense of community than exists at

present in a world where nationalism is still one of the strongest of human emotions. Moreover, the more deeply international law enters into the social and economic fields the more serious are likely to become those obstacles to its advancement which arise from differences of national ideologies in those fields. Still, the movement away from *laissez-faire* has begun, and the machinery for further progress exists in such bodies as the International Labour Organization, the Economic and Social Council of the United Nations, the Food and Agriculture Organization, and many others. What is chiefly lacking is an international public opinion to insist that these instruments shall be fully used.

#### International Law and War

But by far the greatest of all the obstacles which have hitherto retarded the development of international law is war, though when we discuss the attitude of international law to war it is well to remember that it is not only for international, but for other kinds of law as well, that war is an unsolved problem. There are still civil wars in the world, actually they are much commoner events than international wars are. Both kinds of war have their origin in social friction, between parties or factions within the same state in the one case, and between whole states in the other, which law has failed to eliminate. Not many states, if any, can claim that they have finally solved the problem that the persistence of war raises for law, and to condemn international law for not having found an easy solution for it, when states, with all the advantages they enjoy, still find it so baffling, is hardly reasonable.

Early international lawyers assumed almost as self-evident, that the law must distinguish between the legal and the illegal use of armed force, and, therefore that war, except in certain cases, such as self-defence, must be unlawful. But the facts were too strong for this view; it could not alter the fact that states were not willing to recognize the distinction in their practice and were resolved whatever the law might say to treat war as an instrument of policy.

to be used as and when they pleased. Thus war has always confronted the international lawyer with a painful dilemma, he could proclaim, as these early writers did, that war was only legal for certain specified causes, which was to uphold an academic view manifestly out of touch with the realities of international relations or else he could frankly admit that war is an event which unfortunately does occur from time to time in the relations of states, that when it occurs it is almost like an event in the natural world, neither legal nor illegal, but also that it effects a sort of legal transformation scene, and brings into operation certain special rules of the law which do not apply in times of peace.

These laws of war have had two main objects: some of them are intended to make the conduct of war less inhumane than it would otherwise be, and others try to regulate the relations between belligerent states and the neutral states which stand outside the war.

#### *Human Laws Versus Military Needs*

They have always attracted a disproportionate amount of the attention both of lawyers and of laymen, and there may still be some who think of international law as mainly a body of rules which states are supposed to follow when they are fighting one another. It was the fashion, too, until a generation ago for states, on the rare occasions when they thought of improving international law at all to give most of their attention to the laws of war, most of the conventions which were made at the two so-called Peace Conferences of The Hague in 1899 and 1907 were not concerned with the professed object of the conferences, but with how states ought to behave when they went to war.

It would be an exaggeration, but not a great exaggeration, to say that all these efforts to build up laws of war have been entirely useless. When the rules do not call on belligerent states to sacrifice some important military advantage, they have often been fairly well observed, for example, rules for the decent treatment of the sick and wounded and prisoners, and of the civilian inhabitants of occupied terri-

tory, are of this type. But the totalitarian states have shown that even within this limited field law is only a frail protection. Most of the rules, however, do, or at any rate may, require for their observance that a belligerent should forfeit some military advantage, and that means that we are demanding that he should place humanity before military success. That is to misunderstand the very nature of war, to picture it as a sort of game which is played for its own sake, and to forget that the object of war is always to make the will of one side prevail over that of the other, and that nothing, but the determination to secure victory whatever the cost makes it worth while to go to war at all. Time after time in the history of war the prohibition of new weapons, which were regarded as peculiarly barbarous, has failed. Men tried in turn to forbid or to regulate the cross bow, the musket, the bayonet, the torpedo, the submarine, poison gas, and the aero plane, and the result has always been the same, the new weapon has had to be accepted because it was found to be effective for the purposes of war. So that if we are tempted today to hope that mere rules of law will help us to control the atomic bomb we shall be deaf to the plain teaching of the history of war.

#### *Belligerents and Neutrals*

Those of the laws of war which concern relations between belligerents and neutrals raise rather different considerations. Neutrality grew up by way of compromise between two conflicting interests, each of which could not avoid making certain concessions to the other, belligerents would have preferred to pursue their aims without having to respect the interests of the neutrals, and neutrals would have liked to maintain in full their peacetime relations with both sides and to exploit the opportunities which a war often opens for specially profitable neutral trading. Naturally, therefore, the respect which laws of neutrality have received in different wars has varied with the power of the neutral states to make their rights respected, and when the neutrals have been weak, as they are when a war is world-wide or nearly so



they have little effect on the conduct of war

But even if the laws of neutrality had more chance of being observed than they have in a modern war their further development would still be an anti social thing For the very status of neutrality is founded in the assumption that states as a body have no responsibility for the preservation of peace that a war is only the concern of the states which happen to be engaged in it and that since wars cannot be

abolished we must be content to build a ring fence around the states at war and let them fight out their quarrel without regard to the justice or injustice of their respective causes, with the minimum of inconvenience to the rest of the world This is an unworthy ideal of international relations and to cling to it would be to despair of the future of our civilization

Some account of the procedural side of the international system must now be given



In 1920 there was established the first standing international court of law, the Permanent Court of International Justice with its seat at The Hague. But before this, states had always been able to settle their disputes on the basis of law, if they chose to do so, by arbitration, and they had often done so. Arbitration is a term that is often used loosely and inaccurately, but to the lawyer it has a definite meaning. It does not simply mean the peaceful settlement of a

#### BROUGHT TO BOOK

*A trial unique in history, carried out by legal representatives of the victor Powers on the conclusion of the Second World War, turned some of the most cruel and pompous figures who ever trod the world stage into subdued elderly men on trial for their lives. This, together with the trial and punishment of lesser figures, Belkente gaolers and the like, has established the principle that murder and inhumanity, whether effected impersonally through subordinates, or personally on orders from above, shall no longer be exonerated by the plea of patriotism and national necessity. Responsibility for our conduct in war as in peace is now placed squarely on every one of us—where it rightly belongs—and it is for the individual to refrain from committing a barbarity, at no matter what cost to himself. Recognizable among the prisoners is Goering (wearing earphones beside the desk). Next to him are Hess and Ribbentrop.*

dispute by any method, it means a settlement by a genuinely legal process. A court of arbitration differs from a court of justice only in the fact that arbitrators are chosen by the parties for the purpose of deciding a particular case, whereas judges are appointed in permanence or for a term of years to hear any cases that may be brought before them. There is no difference of function between the arbitrator and the judge; both are equally bound to apply the law unless they are specially authorized by the parties to decide the case on other grounds, which in practice arbitrators are more often asked to do than permanent judges are.

All the same the establishment of the Permanent Court in 1920 was a great advance. Its very existence is symbolic, for it stands in the eyes of the world as an embodiment, or at least a forerunner, of the international rule of law. A standing court, too, can develop the law from case to case in a way that the decisions of arbitrators, whose office ends when they have decided a particular case, can never do.

Under the Charter of the United Nations the Permanent Court has been superseded by a new court, the International Court of

Justice, but the change is little more than a change of name. There are fifteen judges of this new court and they must be of different nationalities. They are elected for nine years five retiring every three years. There are safeguards to ensure that they shall be completely independent, for instance they can only be dismissed by the unanimous vote of their colleagues on the court their salaries may not be reduced during their term of office, they enjoy diplomatic immunities when engaged on the business of the court and they may not engage in any occupation which would be inconsistent with their judicial office. They are elected by the Security Council and the General Assembly of the United Nations voting separately and if these two bodies should be unable to agree so as to fill all the places on the court any seats left vacant are filled by the choice of the judges already elected.

Only states and not individuals, can bring a suit before the court. But there is a procedure by which the case of an individual who claims to have suffered some injury from a foreign state for which he has been unable to get redress can be brought before the court if his own state thinks fit to take up his cause and make it its own. Many of the cases which came before the Permanent Court were of this type. The other most common type of case with which the court had to deal was disputes as to the interpretation of treaties.

#### Voluntary Jurisdiction

There is an important difference between the powers of the International Court and those of an ordinary court of justice inside a state. The jurisdiction of the International Court is not compulsory but voluntary that is to say, a state can only be brought before it with its own consent. Clearly this reduces the usefulness of the court very seriously and the question whether compulsory jurisdiction ought to be conferred on international courts is one of the most debated in the whole field of international law. There are however, two ways in which the voluntary character of the court's jurisdiction is qualified to some extent. A treaty may and often does con-

tain a clause providing that if the parties differ as to its interpretation or execution their difference may be taken to the court without any further agreement being necessary and the statute of the court itself contains a clause, commonly called the *Optional Clause*, because a state may join the court without accepting this provision, under which states recognize the court's jurisdiction as compulsory in all disputes of certain specified kinds, of which the most important are disputes about the interpretation of treaties and about questions of international law. This *Optional Clause* has been accepted by many states though some of them have hedged about their acceptances by reservations which seriously reduce the extent of their obligations. Still these qualifications do not alter the fact that no action can be brought against a state unless it consents to be sued they only mean that the consent can if states choose be given in general terms and before an actual dispute has broken out. In practice the present state of affairs too often means that a state only allows a dispute to come before the court when it regards it as not very important when in fact it has decided that even if it loses the case none of those national interests which it regards as vital will be impaired.

#### Disputes Tend to be Political

Nevertheless, there is a real difficulty which has to be met by those who advocate the compulsory jurisdiction of international courts. We may admit that the reluctance of states to entrust their interests to the risks of a judicial decision is often an abuse of the freedom which their sovereignty allows them, but this does not alter the fact that not every international dispute is suitable for judicial settlement, or as lawyers say, is "justiciable." Many disputes and unfortunately most of the more serious ones, are political and not legal that is to say, they arise out of a conflict of interests and not from a quarrel about legal rights, and a political dispute between states is no more likely to be settled satisfactorily by a court of law than would be a political dispute inside a state. There is hardly any real analogy between most of

the disputes of states and those of individuals within a state, which we assume as a matter of course that a court of law will settle. The nearest domestic analogy to an international dispute is a dispute between political parties, or between capital and labour, and, for the settlement of disputes of that kind we do not rely on courts of law but on very different methods. We discuss, we try to arrange compromises, or perhaps we alter the existing law by legislation. But it would never occur to us to use a court of law, and yet that would not be more absurd than to suppose that courts can decide *all* the disputes of states.

#### How the Court Works

Courts then can have only a limited function in the maintenance of international order, but they are indispensable none the less. They cannot decide all, but they can and ought to decide many of the disputes of states, and if they are to play their part there should be some accepted means of distinguishing between disputes which are by their nature justiciable, and those which are not. It is not easy, but it is not impossible, to find such a test, and probably the Optional Clause, already mentioned, shows the lines on which progress might be possible. But until the disputes to which judicial settlement is to apply can be divided off from those others to which it is not, it is likely that states will insist on retaining the present voluntary character of international judicial settlement.

No method for enforcing the judgments of the International Court is prescribed in its statute, but enforcement is not a serious question so long as the jurisdiction remains voluntary and cases are only submitted to the court when the parties have counted the cost of a possible adverse decision. The Charter of the United Nations does, however, now provide that if one party fails to comply with a judgment, the other may appeal to the Security Council, which may decide on measures to be taken to give effect to it.

When the court hears a dispute between states, it is said to exercise its contentious jurisdiction. Besides this it has an advisory jurisdiction, under which it may give an

opinion, at the request of the Security Council or the General Assembly of the United Nations, or of any specialized agency which has been authorized by the General Assembly to request such an opinion on any legal question. This function was found useful in the League but it needs to be carefully guarded if it is not to impair the judicial character of the court. It might do so if, for instance, the court were to be asked for its opinion on some abstract or hypothetical point of law, or if it were to give its opinions without hearing arguments from all the states whose interests may be affected. In practice the Permanent Court was scrupulously careful in this respect, and as far as possible it assimilated the procedure in its advisory to that in its contentious jurisdiction. An advisory opinion, coming from so high a source naturally has a great moral authority, but as the term implies it has not the binding force of an actual judgment.

#### Value of International Law

It is natural to ask what the real value is of this system of international law which has now been described in outline. Does it affect the way in which states behave to one another to any serious extent and what prospect, if any is there that it may be developed into a greater force for good in the world than it has hitherto been? Questions like these are not easy to answer, but they are questions on which it is important that intelligent judgment should be brought to bear.

Of course it has to be admitted at the outset that states are not yet subject to law in a way that is at all comparable to the subjection to law of human beings in any tolerably well-ordered modern state. On the other hand it is easy to depreciate unfairly the service that international law does already render to the world. For it is not true, as is too commonly supposed, that states habitually violate its rules, or that they make treaties only to break them as soon as their obligations become inconvenient. Even a slight acquaintance with the manner in which foreign relations are actually conducted would show that that is an overstatement. Unfortunately



FOREIGN MINISTERS

*Since the end of the Second World War the victorious nations in Europe have held various conferences to discuss the problems of the defeated countries, and to pave the way for the*

most people have no first-hand acquaintance with such matters, and they form their opinions of international law in ignorance of many of the relevant facts. Generally they only give a thought to it when they hear that it has been broken in some particularly flagrant way. The business which goes on between one state and another often has to be carried on without publicity, and much of it also would not be of any general interest even if it were made public. That is particularly true of most of the legal side of foreign affairs, especially so long as they run smoothly, except to the legal specialist and to the particular individuals whose interests it may affect, the legal business of states is dull and unexciting. Contrary to what is often supposed, it is only rarely concerned with matters of high politics. Most of it relates to matters such as the drafting or the interpretation of treaties, which deal with an almost infinite variety of subjects, non-political more often than political, and more

often of secondary than of first-rate importance, or it concerns such matters as the alleged wrong treatment of the person or property of the subject of one state in the territory of another. So long as international law is dealing with matters of this kind, which are important in themselves, though less important than the great political issues which do occasionally arise, the system works tolerably well. In normal times states do generally respect and observe it, and it conduces to the smooth running of their relations.

But when an issue is political, the case is different, and the authority of international law much weaker. Then there is a sort of tacit understanding among states that its claim on their allegiance must not be pitched too high; it must not call upon them to make any serious sacrifice of those interests which they consider vital to themselves. Not that as a rule they openly defy the law even then; but they can obstruct its operation without doing that, by refus-



#### MEET AND CONFER

*official peacemaking Above a conference in London attended by foreign ministers (with their advisers) of four Powers—France Great Britain Russia and the United States*

ing to allow their legal rights to be determined by any authority but their own.

This half-hearted acceptance by states of the supremacy of law is, of course, to be regretted, yet it will only surprise us if we have exaggerated the place of law in human society in general. Much the same attitude towards law can be seen inside the state when great issues of politics or economics arise between powerful factions or associations. The difference is that in the state, when legal methods of adjusting cases of friction are recognized to be unavailing, we supplement them by political methods. The real weakness of international law is that these other methods are as yet so little developed. We have a useful metaphor to express the interdependence of the different parts of government in the state, we call the state the "body politic." Now law is rather like a limb of this body, and not only can a limb not do the work of the whole body, but it cannot even do its own proper work unless

it is attached to the body. The misfortune of international law is that there has never been an international body politic. We have tried to make this bodiless limb do the work of the whole body as though law could be the whole of government.

The root of the whole matter is that better international organization is an essential condition of a better international law. But that is only one of the reasons which make better organization an urgent need today. In the modern world no single state can secure the maximum of welfare even for its own people unless in many matters it brings its own policies into line with those of other nations. In social and economic matters each state is far more sensitive to events in other states to foreign unemployment, for instance, or monetary disturbance, or low wage rates than it was when commerce was less varied and communications slower. In the field of security changes in the methods and instruments of war have destroyed for most states all



possibility of single-handed defence, and with the coming of the atomic bomb that possibility has probably disappeared for all of them. Other changes, too, have made it more necessary for states to co-operate. We have seen how international law grew up as a system of *laissez-faire*, assuming a world made up of sovereign states living side by side with a minimum of restraints on their freedom of action and of co-ordination between their policies. That state of things was tolerable in times when governments controlled only a small part of the lives of their citizens, and deficiencies in interstate organization could be made good by the activities of private organizations and individuals operating more or less freely across national frontiers. Today all governments, some of set policy, and others under the compulsion of tendencies which they find it impossible to resist, are extending their control into spheres which were formerly left to private enterprise, and thereby making a defective international organization a far more serious handicap than it used to be. Reluctantly and slowly states are beginning to recognize these facts, and to do something about them.

In the second part of the nineteenth century states began to place on an international basis a few government services which it was impossible for them to run except by co-operating with one another, they set up certain "public international unions," of which the Universal Postal Union, established in 1874, is perhaps the best known and the most successful. They dealt with such other matters as telegraphs, health, copyright on similar co-operative lines

#### Concert of Europe

These nineteenth-century experiments were all isolated affairs, and states were still far from recognizing that co-ordination of their policies must be a normal part of the business of government. They were all concerned, too, with matters in which the political element was not very prominent. Political issues, which raise far more difficult problems, were left to diplomacy to be arranged through the legations which states maintain in each other's capitals, or at conferences convened to discuss some

particular matter on which it had become urgent to concert a joint policy. When a political issue had become so critical that a decision of some sort had to be taken in the general interest, the Great Powers, acting as the so-called Concert of Europe, sometimes assumed the right to decide the question and to impose their decision on the smaller powers. Thus the Treaty of London in 1839 recognized Belgium as an independent kingdom, the Congress of Berlin in 1878 rearranged the affairs of the Balkans, and the Conference of Algiers in 1906 those of Morocco. The Concert often tided Europe through dangerous crises, for a serious war has always been impossible when the Great Powers were able to agree on a common policy. But it had no definite constitution or times or places of meeting, if it acted, it did so because action could no longer be delayed and because there was no more regular procedure for dealing with a crisis. The Concert in fact was a political arrangement and not a legal institution.

#### Value of the League

It was not until after the First World War and as a result of its lessons that states made their first attempt to create a sort of international constitution within which, it was hoped, their relations would be carried on in an orderly way. The League of Nations which they then set up was a great experiment, and though it did not realize the hopes which were placed in it, the failure was not due to any defect in the original conception. It failed for a reason which would have wrecked even the most perfectly designed of international institutions, the failure of the Great Powers to support it whole-heartedly. Of the seven world powers or potential world powers at that date, one, the United States, refused to join it, another the Soviet Union only came in at a late date when it had become almost certain that the League was not going to succeed, three, Germany, Italy and Japan, repudiated after a few years everything for which it stood, and the remaining two, Britain and France, were never more than half-hearted in its support and in any



## FOREIGN OFFICE WHITEHALL

*The stairway at the Foreign Office, in Whitehall, up which foreign envoys have carried notes of protest and even declarations of war. The office of Foreign Secretary, a parliamentary appointment, dates from 1782. Above, Mr R A Butler, one-time Parliamentary Under-Secretary, discusses business with a councillor.*

case could hardly be expected to bear a burden which the attitude of the others had made so much heavier than they had counted on.

Even so, as a plan for promoting international co-operation, the League produced results of lasting value. From that point of view it was simply a convenient arrangement for facilitating deliberation and discussion, a permanent framework for international conferences. In the nineteenth century each conference had to be separately arranged through the diplomatic channels, it often met with insufficient preparation, and dispersed without leaving behind it adequate machinery for putting its decisions into effect. The League, on the other hand, was always in being, and it was served by a body of experienced international civil servants, who were to prepare its business and to carry out the decisions to which a conference might lead. Unlike previous international institutions, moreover, it was not a specialized body dealing only with one kind of business, it could take up any matter which states decided was of sufficient common interest to make the co-ordination of their respective policies desirable. But the promotion of international co-operation was only one of the purposes for which it was founded. The second, in the words of the Covenant, was "to achieve international peace and security," and in this it did not succeed. Unfortunately, without an assurance of peace, the progress which it did achieve was necessarily insecure.

#### U. N. O. Replaces League

The United Nations Organization, which has now replaced the League, has the same purposes, these, indeed, are the two purposes at which any attempt to create an orderly world is bound to aim. It differs from the League chiefly in the method by which it proposes to secure the maintenance of peace, and perhaps the easiest way to understand both the merits and the dangers of the new method will be to compare the Covenant and the Charter in this matter.

The Covenant did not forbid war in all

circumstances. It said in the first place that any war or threat of war was to be a matter of concern to the whole League, and that the League would take any action about it which was deemed wise and effectual. That was vague, but the Covenant went on to say that if a state resorted to war in certain stated circumstances, then it would be the duty of all the members to take action against this state in defence of the peace, economic action in the first place, but, if necessary, military action, too. The circumstances in which this obligation to take "sanctions" was to arise were precisely formulated, but the general effect was that if a state went to war without first having tried all possible means of arriving at a peaceful settlement, then it was to be liable to have sanctions imposed against it. Thus in theory a war might occur to which sanctions did not apply, but this was most unlikely, and in fact all the wars that did break out after the founding of the League were of the kind to which sanctions were to be applied.

#### Sanctions and War

Now the distinctive feature of the League plan was that if a state went to war, each of the other states had to decide for itself whether it had done so "in disregard of its covenants," but neither the Council nor any other organ of the League had the right to decide whether the test was satisfied. All that the Council could do was to try to induce the members to adopt a uniform policy, the last word remained with the members individually. This has often been regarded as a defect of the Covenant scheme, and it certainly meant that sanctions would depend on the good faith of the members. But then any scheme can only succeed if states are willing to honour their obligations. Actually the League sanctions were only used once, against Italy in 1935, and then the fact that each state had the right to decide for itself whether it was bound to join in them had absolutely nothing to do with their failure. If the Council had been able to order the members to impose sanctions, the result would have been exactly the same.

The great difference between this plan of

collective security and the new one of the United Nations is that the Security Council of the United Nations has been given this power of taking decisions for all the member states. It has the primary responsibility for the maintenance of peace and all the members agree to accept and carry out its decisions. But, the result of giving this wide power to the Security Council was to raise a very awkward question as to the method of voting by which the Security Council was to reach its decisions. This question did not arise under the League plan because the League Council could not take decisions for the whole body of members. The Charter has answered it by a very complicated arrangement which will be more easily understood if we first look at the constitution of the Security Council.

#### Security Council Membership

There are eleven members, five are permanent namely China, France, the Soviet Union, the United States, and the United Kingdom, and six are elected by the General Assembly for a term of two years. Each member has one vote, and all decisions require the affirmative votes of seven members, but unless the matter is one of procedure, these seven must include all the permanent members, although practice has shown that an abstention is not equivalent to a veto. Procedural questions are likely to be the less important questions, and they can be decided by the votes of any seven members. But the ordinary rule of voting is that each of the permanent members has the right to veto any decision.

There is one other exception to the veto rule. When the Security Council investigates a dispute, a party to the dispute must abstain from voting. But this is only a slight modification of the veto right, for it only applies if two conditions are satisfied. There must be a "dispute," and the Charter distinguishes between an actual dispute and a mere "situation" which might give rise to a dispute. If the Security Council is dealing with the latter then a permanent member, however closely concerned it may be in the "situation," can veto any decision. And it is only if the permanent member is a party to a dispute

that it need abstain, in a dispute between other states there is nothing to prevent it from using its veto to help one of the parties with which it happens to be friendly against the other.

All the elaborate provisions which follow in the Charter about the kind of action that the Security Council may take if it becomes necessary to enforce the peace must be read in the light of these veto provisions. When it has decided that a threat to, or a breach of, the peace exists, it may decide in the first instance that something ought to be done to prevent an aggravation of the situation and it may call upon the parties to comply with any provisional measures that it deems necessary, without prejudice to their rights or claims in the eventual settlement. Then it may go on to order measures which do not involve the use of armed force, such as the interruption of economic relations or of communications, or the severance of diplomatic relations. In the last resort, if measures of this kind are not enough, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.

#### Use of Armed Forces

The Security Council itself has no armed forces, and these therefore have to be supplied by the individual members. They are to do this under agreements still to be negotiated between the Security Council on the one side and a member or group of members on the other. The members will undertake to make available to the Security Council armed forces and other forms of assistance, such as rights of passage over their territories. The numbers and types of the forces are to be specified, the degree of readiness in which they are to be held, and other details but before the Security Council calls upon a member not represented on it to fulfil the terms of its agreement, it must invite that member if it so desires, to participate in the decisions concerning the employment of its own contingent. The agreements are also to arrange for national air-force contingents to be held immediately available in order that urgent military measures may be taken

if necessary. There is to be a military staff committee, consisting of the chiefs of staff of the permanent members, to make plans for the application of armed force and to advise the Council on all questions relating to the Council's military requirements. None of these provisions, however, impairs the right of a member to defend itself if it should be attacked, until the Council can take the measures necessary to maintain the peace, but any such acts of self-defence must be immediately reported to the Council and will not affect its authority or responsibility.

Finally the Charter authorizes the making of regional arrangements for maintaining peace and members entering into such arrangements are to try to settle their local disputes before referring them to the Council. But no enforcement action may be taken under regional arrangements without the authorization of the Council except to prevent a renewal of aggression on the part of a state which has been an enemy of any signatory of the Charter during the Second World War.

#### Great Powers and the Veto

Time may show the value of these carefully elaborated provisions for the preservation of peace. Clearly the existence of the veto means that they cannot be used against a Great Power if the Covenant had contained similar provisions Italy could have vetoed the sanctions of 1935, and, so far as the League was concerned, proceeded undisturbed with her aggression against Ethiopia. A scheme of collective security in which that would be possible hardly seems to deserve the name. The privileged position of the Great Powers has been defended on the supposedly realistic ground that to impose sanctions against a Great Power would mean the break-up of the United Nations in any case, veto or no veto. But that is not certain, and even if it were true that none of the powers which are now ranked as great could in any circumstances be compelled to obey the law against its will, that would hardly be a good reason for placing it above the law. There seem to be two cases only in which the enforcement provisions of the Charter

could ever be used, and in neither of these cases would they be necessary. They could be used against a small power but the quarrels of small powers are only dangerous to world peace when one of them is backed by a Great Power, and in that case the veto could be brought into play. They could be used also against the powers defeated in the late war, and probably that was the contingency most in the minds of the authors of the Charter, but there are simpler means of dealing with a revival of aggressive tendencies in Germany or Japan.

The veto is the price that the world has had to pay to secure the adhesion of certain powerful states to the United Nations. It may have been inevitable, but it is a heavy, perhaps even a crippling price, none the less. It has been justified on the ground that when action has to be taken to give effect to a decision of the United Nations the main burden must, from the nature of the case, fall upon the Great Powers, and they cannot be expected to allow this burden to be put upon them by others who will not share it. But the veto goes far beyond anything that a Great Power needs in order to protect its own legitimate interests. Probably it was assumed that it was only for that purpose and in the last resort that it would be used. But it can be and even in the short experience of the United Nations it has been, used to prevent the Security Council from reaching decisions which had nothing whatever to do with the special interests of the vetoing power, which did not call for any action at all to be taken by the Security Council, but with which that power merely did not agree.

#### Further Functions

The second main organ of the United Nations is the General Assembly, which consists of all the members of the organization, each having one vote and not more than five representatives. It meets annually or, if necessary more often. It may take some of its decisions by a bare majority of the members present and voting but on "important questions" a two-thirds majority is necessary, and "important questions" include recommendations with respect to the maintenance of peace, the



#### HOW ONE NATION VIEWS ITS PAST

*This poster epitomizes the experience and fears of the French nation, fears which every nation may justly hold in some degree. Yet, as war and its weapons become ever more terrible for all, humanity can never again rest easy in mind until it has devised some definite means of eliminating war from the world.*

election of the non-permanent members\* of the Security Council and of the members of the Economic and Social and, of the Trusteeship Councils to be, mentioned later, the admission, suspension and expulsion of members, and budgetary questions. But these provisions for majority decisions are less radical than they may appear, for they must be read in the light of the kind of decisions which alone the General Assembly has the power to take. In general its decisions, unlike those of the Security Council, cannot impose obligations on the member states, and this no doubt is the reason why the Great Powers have not been given a right of veto on them. Its decision can only be decisions to make recommendations of various kinds, either to the Security Council, or to a state. It may also discuss any matter within the scope of the Charter, except that on matters relating to the maintenance of peace there are provisions to prevent it from encroach-

ing on the functions of the Security Council, and for action needed on any such matter it must refer to the Council. But on all matters other than those relating to security the Assembly is the supreme organ of the United Nations. It is to promote international co-operation in the political, legal, economic, social, cultural, educational, and health fields, and to assist in realizing human rights and fundamental freedoms for all. It is also the financial organ of the United Nations, and has to approve the budget, and apportion the expenses among the members.

The Charter has also set up two councils which are in effect standing committees of the General Assembly, the Economic and Social Council, and the Trusteeship Council. The Economic and Social Council is to study economic and social questions, and make recommendations about them either to the Assembly, or to member states, or to specialized outside agencies, such as the



MR. TRYGVÉ LIE

*First to be appointed as Secretary General of U.N.O. a position calling for strict impartiality was Mr. Lie, a Norwegian*

international Labour Organization whose functions fall within the scope of those of the Council. Agreements with International Labour Food and Agriculture Educational Scientific and Cultural and International Civil Aviation Organizations have been approved while a coordinating committee is at work.

The Trusteeship Council is the body through which the General Assembly will supervise the working of the Trusteeship system which is now to take the place of the Mandate system of the League. So far trust agreements have been approved for the following territories: New Guinea (Australia), Ruanda Urundi (Belgium), French Cameroons and French Togoland (France), West Samoa (New Zealand), British Cameroons and Togoland and Tanganyika (United Kingdom), Japanese Pacific Islands (United States) and Nauru (Australia, New Zealand and United Kingdom). In addition it is also proposed to place Jerusalem under the Trusteeship Council. The objectives are similar to tho-

of the Mandate system, namely to promote the interests of the inhabitants of the territories and to train them for self government or independence. Two new features are that the administering authority may be either a state or states or even the United Nations itself and that a trust territory may be designated as a strategic area in which case the Security Council and not the General Assembly will act for the United Nations. The administering authority of a Trust territory must make an annual report on the basis of a questionnaire formulated by the Trusteeship Council and the General Assembly is to consider these reports, examine petitions and may arrange for periodic visits to the territories.

Like the League the United Nations has a secretariat, and the first Secretary General is a Norwegian Mr. Trygve Lie. He must make an annual report to the General Assembly on the work of the United Nations and he has also been given the function of bringing before the Security Council any matter which in his opinion threatens the maintenance of peace. Obviously it is important that members of the secretariat should never forget that they are international officials responsible only to the United Nations. The Charter therefore forbids them to seek or receive instructions from any government and the members of the United Nations have undertaken to respect their international character.

It is too early to prophesy whether the United Nations will succeed better than the League. The handicap of the veto provisions has already been mentioned and there are other respects in which the Charter is a less satisfactory document than the Covenant. The Covenant was short and informal; it did not cramp the League by minute prescriptions about its future activities; it gave it the bare outlines of a constitution and left most of the details to be filled in as experience accumulated. The Charter is much longer and already its articles are raising difficulties of interpretation for the lawyers, limiting provisions and awkward gaps are showing that the attempt to provide for all contingencies has failed as it was certain to do.

On the other hand, in some respects the

Charter is a more realistic document than the Covenant. Though it contains much of the high-sounding but little-meaning verbiage in which states habitually wrap their real intentions, its authors were clearly not deceived, they knew that we are living in a world of power politics, and they accepted the fact. The United Nations has been born into a world whose outlook in international affairs is very different from that of 1919. Many illusions have been shed since then, and that is all to the good. The man in the street does not believe today that wars are fought to end wars, and he does not regard the United Nations, as many people regarded the League, as an automatic safeguard of future peace. The statesman and the diplomat again for their part have abandoned an equally dangerous

opposite illusion which many of them held a generation ago. They do not now look on international institutions as the fad of an eccentric American president, they know that the only truly realistic view is that they cannot be dispensed with if our civilization is to survive.

But whether the Charter is or is not a better document is after all a secondary matter: its terms will not decide the fortunes of the United Nations any more than the Covenant did those of the League. The United Nations will fail as the League failed, only if states and especially the Great Powers, treat it as they formerly treated the League. If, on the other hand, they determine that it shall be made to work, then, whatever its imperfections may be, it will succeed in its task.

### Test Yourself

- 1 What is the connexion between the Reformation and the rise of international law?
- 2 What are the two sources from which the rules of international law are drawn?
- 3 What two functions do treaties perform in international law?
- 4 Mention one profound distinction between the function fulfilled by international law for the whole body of States and that fulfilled by the law of a single State.
- 5 What views have been taken at different times as to the legality of war?
- 6 What are the two great divisions of the laws of war?
- 7 What is the distinction between an arbitrator and a judge?
- 8 Mention three important characteristics of the International Court of Justice.
- 9 What is the fundamental difficulty of conferring compulsory jurisdiction on an international court?
- 10 What were the two purposes for which the League of Nations was founded?
- 11 What is the outstanding difference between the system of collective security of the League of Nations and of the United Nations?

*Answers will be found at the end of the book*



# GUIDE TO FURTHER STUDY

## Part I—The Study of Times Past

FOR our own convenience we keep dividing knowledge up into various neat compartments. Every teacher does this, every scientist, every living man or woman. It is an attempt to simplify and reduce to "knowledgeable" dimensions the infinite complications of the natural world.

Yet we must never forget that this is an artificial process. Every compartment of knowledge from the large category to the tiny group relates only to one aspect of the truth and when we concentrate on the compartment immediately before us—as we must in trying to learn about anything—we should remember that our view is for the moment a one-sided view, and we must soon look into the related compartments to get a fuller and more balanced picture of the whole truth.

### Links With Past and Future

You could, for example, describe a plant in terms of what is growing up before your eyes—stem, leaves and flower. But that neat compartment tells you only a part of the truth about the plant. The roots are out of sight and still more important is the seed which gave rise to the plant, and the surrounding soil containing the elements which feed the plant and the water which dissolves the elements, and the air and the sunlight without which it could neither breathe nor grow. In a word, a plant is bound by a thousand links to all the circumstances of its past and present history, and your understanding of the plant will expand in proportion as it includes these links and grasps them in their relation to the plant as one living productive combination of circumstances of which the immediate visible form of the plant is only one aspect.

It may seem to be a far cry from this example to our present subject, but this is not so. Here we are concerned with human institutions—political institutions, forms

of law and government. To describe these institutions as they appear to us who use them is like describing only the visible aspect of a growing plant.

It is therefore no accident that, although the authors of most of the chapters of this book tell us a great deal about the living visible aspect of our institutions, they yet constantly find it necessary to go back into history and try to relate present institutions to their origin in the past. This is just as it should be. The more you advance in your study of political institutions the more you will appreciate that they are right.

A purely descriptive account of institutions dis severed from their history and origin in the past is far from being fully informative. It can be highly misleading. You cannot understand an institution much less judge it, unless you have knowledge both of the various forces which brought it into being, and of the new forces which may be influencing its present and may modify its future. Briefly you must study the growth in relation to the soil from which it sprang.

### Understanding the World We Live In

A recent writer, A. L. Rowse, in a little book called *The Use of History*, has put very well the reasons for this need of an historical approach to the story of the present. The prime, though not, he says the only, use of history is that it enables you to understand better than any other discipline, the public events, affairs and trends of your own time, and what, he asks, can be more important than that? For if you do not understand the world you live in, you are merely its sport and may well become its victim. History, he goes on, is about human society: its story and how it has come to be what it is, and the knowledge of what societies have been like in the past and of their evolution will give you the clue to the factors which operate in them.

and to the motives and conflicts, both general and personal, that shape events. You are dealing with human nature all the time.

Now it is all-important to remember that in the problems of law and government you are dealing with human nature all the time. However great the temptation to think of political institutions in the abstract we must refrain from doing so, for the men who constructed them did not have a clean slate to write on and were influenced by the given circumstances of their age and had to build with these constantly in mind. You can never make a complete break with the past or transplant the institutions of one mind or age into another without greatly modifying them.

Every revolution in recorded history proves that the slate is never wiped clean; the influences which shape the new revolutionary institutions, the customs, traditions and character of the people, the wealth or poverty of the national resources, the effect of climate and geography on the permanent national interests, strategic, economic or other—all these factors reassert themselves and bring some measure of disillusionment to those who have supposed that a new beginning would mean a new world.

In short, something which we may fairly call political "gradualism" is not really a policy which men are free to accept or reject as a matter of free choice; it is a course to which if we try to depart from it too suddenly or too far, we are likely to be brought back with a jerk which is often very painful.

All the same, although this historical approach to the study of law and government is necessary it carries with it a danger against which we have to be on our guard. We must not let it lead us into historical determinism.

Like the plant we have our roots in the soil of history and are governed by the circumstances into which we are born. But we can do more than enrich the soil with our dead bodies for we are more than plants, and in making the most of our circumstances we often go far to changing our environment itself, producing new conditions for our successors, unimaginable

to the most far-sighted of our ancestors.

History, you see, does not teach us that man is merely a passive instrument in the grip of forces against which he can do nothing, such an idea is as far from the truth as the opposite delusion that he can cut himself loose from the past at will. It does not show us that as things have been, they remain. On the contrary, it shows us that human effort certainly does influence human destiny, and that just as in our private lives each one of us does at any rate to a large extent, make the bed on which he lies by the way in which he manages his personal affairs so as citizens we do influence the course of public affairs by what we contribute or fail to contribute to the life of the community of which we are responsible members.

#### To Each, His Environment

The point is, however, that our capacity to shape our lives, both personal and public, is always limited, though never eliminated, by conditions which we do not create for ourselves but which we inherit. It, therefore, the student of law and government forms his judgments about them without inquiring into the conditions which have shaped the institutions in which they have come to be embodied those judgments will be of very little value. Indeed, the more you advance in your study of law and government the less you can afford to neglect the history of the subject.

Again, we learn much about law and government from the great books which have been written about them in the past. But we cannot read those books intelligently, or separate what is permanently valuable in them from what is no longer true or important, unless we are aware of the circumstances in which they were written. For even the greatest of the writers of these books was a man of a particular age and country, and he naturally assumed an environment which needed no explanation to his contemporaries because they were perfectly familiar with it, but which is often strangely unfamiliar to us of a later age and different land. The more you know of his historical background, the more intelligible do his ideas become.

To take one illustration about which I shall have more to say presently, when Plato and Aristotle wrote about law and government they were thinking about law and government in the Greek city-state or *polis* (from which incidentally we get our word "political"), and our word "state" is a very imperfect translation of this word. The *polis* was a tiny community according to our standard, but to Plato and Aristotle it was the normal stage on which to study the operation of law and government, and all their judgments are coloured by that assumption. Many of those judgments cannot be applied, and their authors would never have intended that they should be applied, to the great modern States in which we live today. You will find that the case is just the same with any other of the great authors of the past. They all wrote, consciously or unconsciously, with the institutions of a particular time and place before their minds.

But if we have to make all these allowances for time and place in reading the old writers, you may ask, perhaps, why they are still worth reading at all. If they discovered the answers to important questions about the nature of law and government, cannot we equally well and more conveniently learn what the answers are from some modern handbook?

#### No Final Answers

Professor Gilbert Murray in a recent book, *Greek Studies*, has given two good reasons against accepting that conclusion. The first is that questions of philosophy unlike questions of science, are not for the most part meant to be settled, they are meant to be understood. In political philosophy, for instance, there is no final answer to questions as to the nature of political obligation, or the proper relation between an individual and the State to which he belongs, or the place that law should hold in government. You will not be able to settle questions such as these, but you may learn to understand them and to reject answers that are definitely wrong, and the best way of doing that is to go through the process of thinking the questions over, more and more closely with the help of the

great minds who have thought about them before.

Professor Murray's second reason is that in order to see the problems clearly, we have to get outside the atmosphere of tradition and convention in which all our thought is inevitably imprisoned, for, if we look at the great permanent problems of philosophy only through the glasses of our present-day western civilization, we are simply hugging our prison walls. The best way to rid ourselves of the domination of those catchwords and unconscious prejudices which limit the horizons of our thinking is to see those problems in a different and unfamiliar setting.

#### Value of Reading Widely

So for all these reasons, and for others which might easily be added to them you should read widely, and even discursively. For the subject of law and government overlaps, not only with history, but with many other subjects of study, with economics, for example, and with ethics and psychology, in short with all those subjects which deepen one's insight into the springs of human conduct.

Wide reading, too, is the best safeguard against an insidious temptation which besets all of us who are attracted by the study of politics, the temptation to mistake slogans for serious argument about great issues. Most of the terms that the student of politics needs to use, words such as democracy or imperialism or communism or fascism are too often used thoughtlessly, they acquire an emotional appeal which is always dangerous, and if we are not careful they are easily debased into mere terms of praise or abuse which we apply to those with whom we do or do not happen on the whole to agree. It is quite impossible to reach sound practical political conclusions unless we analyse the meaning of the terms that we use, are aware of their historical associations, and are on the look-out for those changes of meaning which words suffer in different times and places.

Let us pass now from these general matters to consider briefly particular books that you may find useful to study.

Here will be named a variety of books relating to the principal subjects dealt with in the earlier chapters. They are useful to the student and will enable him to pursue the various aspects which interest him most deeply. You must not, of course, regard the books named as saying the last word on their subject, for no book list can be comprehensive. Regard them as a means of their leading you further into the subject, and from them you will discover other branches and other books which you can trace and study on your own initiative. For the sake of convenience these further suggestions for advanced study have been arranged under headings with which you are already familiar through your present reading; first, those books dealing with political theory in general; secondly, those books dealing with the law and government of those particular countries we have been studying, that is to say, with their political institutions; thirdly, with the



PLATO

*Father of philosophy and author of the Socratic dialogues*

books that carry you further into the study of international law and the relations between states—a study which concerns all who wish our race to survive

## Part 2—Political Theory

An American writer, the late Professor Dunning, wrote a valuable and comprehensive book on the *History of Political Theories* in three volumes, starting from the Greeks and bringing the subject down to the second half of the nineteenth century, and after his death some of his friends and former pupils brought out a fourth volume which carries the story on into the early years of this century. Only the specialist is likely to read through such a big book as this, but any student of political theory will find it very valuable for reference. It gives you a straightforward objective account of the course that has been taken by men's ever-changing ideas about politics from the time when they first began to speculate about them.

A book on a very different scale, which also tries to cover the whole subject, is Sir Frederick Pollock's *Introduction to the Science of Politics*. This is a quite short book and the student might well read it as his first introduction to the subject. Naturally, a book of only 138 pages, as this is, can only give a bird's-eye view of such a huge subject, and it was inevitable, too, that the writer should deal more fully with those parts of the story which interested him the most. It is possible that the book underestimates the importance of medieval political theory, but no other writer has tried to cover the whole history of politics in so short a space, and not many could have done it nearly so well as Sir Frederick Pollock did.

All serious study of political theory must start with the Greeks, and with Plato's *Republic* and Aristotle's *Politics* in particular. There are many good translations and commentaries on both these books, perhaps the most convenient are two recent ones. Dr Cornford's translation of *The Republic* and Sir Ernest Barker's of the *Politics*. As a work of literature *The Republic* is much the greater book of the two, but, as Sir Frederick Pollock says of it, it is more a brilliant exercise of philosophical imagination than a contribution to political science. The real founder of political science is certainly Aristotle. Plato treated the problems of man's private and public life as essentially the same study, but Aristotle was the first writer to separate ethics and politics and he wrote a book on each of them. Of course, he does not deny the close connexion between the two and the connexion was even clearer in the small city-state of the Greeks than it is today. Still the two subjects are not the same, and to regard the State as merely the individual "writ large" as Plato did can be extremely misleading.

#### Experimental Method of Aristotle

Then again it was Aristotle who showed us the only sound method of studying politics, which is the inductive or historical or experimental method. He does not start his exposition, as Plato did, by constructing an ideal State out of his own imagination; he knows that while there are States, there is no such thing in nature as the State, and he therefore based his work on studies which he or his pupils had made of no less than 158 actual constitutions of Greek cities, of which, unfortunately only one, that of Athens, has come down to us. Later writers have not always followed this Aristotelian method. Bodin and Montesquieu followed it, but Hobbes for instance did not, and that is one of his chief defects. For a fuller account of what later political theory owes to Aristotle you will find it useful to refer to Professor Dunning's *History* or the Introduction to Sir Ernest Barker's translation of the *Politics* or, the same writer's chapter on Greek Political Thought in the Fourth

Century in Volume VI of the *Cambridge Ancient History*, or Sir Alfred Zimmern's chapter on "Political Thought in the *Legacy of Greece*" or Sir John Myres's *Political Ideas of the Greeks*. Here it is enough to mention one truth of cardinal importance that we owe to Aristotle. States are natural institutions. They are not something conventional or artificial that men can either have or not have at their choice. Man, said Aristotle, is a "political animal", his own nature compels him to live in a State because it is only by doing so that he can develop his full capacities: the man without a polis, the stateless man, Aristotle thought would be either a worthless creature or else something more than human. This is the truth that Hobbes, and all those later writers who have tried to explain the State as the product of some sort of Social Contract, failed to see. The "natural" man, as Sir Frederick Pollock points out, is exactly the kind of creature that Aristotle rightly regarded as a monster.

Aristotle's *Politics* is a great book, but unfortunately it is not an easy one to read. In the form in which it has come down to us the argument is not well arranged, it reads like notes for lectures which may have been worked up later into a treatise which has been lost. Generally it is much better to learn the ideas of a great writer at first rather than at second hand, but you will get more out of Aristotle if you first read about him in some of the books mentioned above before you try to tackle his own works.

#### State and Society

Something has been said already about the importance of never losing sight of the background against which a work on politics was written, but it may be useful to refer more particularly to some of the pitfalls into which we may fall when we translate the Greek word *polis* by our word "State". In the very first sentence of the *Politics* Aristotle tells us that the *polis* is a kind of association. The modern State however, cannot be accurately called an association; it is an institution in which we organize, not social life in general, but only one side of that life, the political.

The point is that the Greeks did not make the distinction between State and society which we, at least if we are democrats, regard as absolutely fundamental. The *polis* to them was both; it was a comprehensive form of association which contained, or at any rate which they felt ought to contain, everything which the citizen needed for the development of his capacities, spiritual as well as material.

Now in modern times the failure to distinguish between State and society, the belief that there are no limits to the proper function of the State because it can provide of itself everything which is necessary

the good life, is the essence of totalitarianism, and in a sense it has to be admitted that the Greek view of the State was a totalitarian one. One may properly ask, therefore, why Greek political theory is still important to us except as a warning of something to avoid. The answer is that the resemblance to modern totalitarianism is only superficial, and the explanation of that lies in the character of the *polis*. The Greeks could allow the claims of the *polis* to extend to the whole of life without thereby sacrificing the individual as modern totalitarianism does, partly because the *polis* was such a small and therefore such an intimate society, and partly because its government left the citizens extraordinarily free to live their own lives.

This, however, is not the place for a defence of the Greeks, the main point to remember is the importance of looking at their political ideas in their historical setting if one is to understand them properly. But if you hear the charge of totalitarianism brought against the Greeks, read Sir Alfred Zimmern's *Greek Commonwealth*, and especially his very fine translation of the famous Funeral Speech

which Thucydides puts into the mouth of Pericles in commemoration of the Athenians who died in the Peloponnesian War; you will then see how little the Greek political ideals had in common with the fascism of our own times.

ARISTOTLE  
His writings have greatly influenced the Christian philosophers and authors of all ages



After Aristotle's *Politics* there is no great book on politics for many centuries. This lack creates a special difficulty in advising the student as to his reading. For the absence of any great book does not mean that men ceased to speculate about politics; it means that to discover what they were thinking we often have to go to books which were not primarily political in their subject matter, and in which therefore the political passages are not systematically arranged and often not even consistent with one another. For instance, to take the most obvious illustration, St. Paul has

had a tremendous influence on the development of political theory, but he never wrote a book about politics, and he probably never constructed even for himself a thought-out theory of the nature of law and government.

Soon after Aristotle's death in 322 B.C., the whole background of political thought was profoundly changed. The *polis*, independent and self-sufficient, ceased to be the basis on which that thought was founded, for its great days were over and the world had entered on a long era of world-wide empires. First came the empire of Alexander the Great of Macedon, who as a boy had been a pupil of Aristotle, though he must have forgotten most of what Aristotle taught him when he grew up, then the Roman Empire followed, and then all through the Middle Ages the two world powers which succeeded Rome in the west, the Papacy and the Holy Roman Empire of Charlemagne and his successors. Thus for nearly two thousand years the background of political thinking became cosmopolitan and so it remained until the Reformation in the sixteenth century of our era, one result of which, on the political side, was the consolidation of the system of nation States in which we live today.

#### What We Owe to the Stoics

The decay of the Greek city-state in the age which we call the Hellenistic, that is to say, in the last three centuries of the pre-Christian era, had some curious consequences for political theory. The literature of that time has been lost, and we know its trend only at second hand, through Latin writers such as Cicero. But the change that occurred seems to have been something like this. Law and government had ceased to be matters on which the individual could exert any influence, and men ceased therefore to speculate about their nature. The individual was driven in upon himself, it was not as a citizen, as a member of a community, that he had to solve life's problems, but as a lonely individual. But men did not on that account cease to be philosophers, and there developed certain philosophic schools which indirectly had important effects on political theory. For

you cannot speculate about the private problems of the individual without, at any rate by implication, arriving at some views about his relation to his State.

Of these schools the most important for our purpose was the Stoic, and it is probable that we owe to the Stoics three ideas of absolutely first-rate importance which have influenced all later political theory. The first of these is the doctrine that fundamentally all men are equal. This idea of human equality was altogether strange to earlier Greek thought, the distinction between Greek and barbarian had been as fundamental to the Greeks as that between Jew and Gentile was to the Jews. So had been the distinction between free man and slave, Aristotle had even taught that some men were natural slaves. But the coming of empire broke down the exclusiveness of Greek life, and spread Greek culture over all the Near East. The Stoic philosophers drew the logical consequences. Men are equal, they said, because nature has given all of them the faculty of reason, and those inequalities that do actually exist among them are artificial perversions of their true nature. In the *History of Medieval Political Theory in the West* the brothers Carlyle have suggested that there is no change in political theory so startling in its completeness as this. It is the beginning, they say, of a theory of human nature and society of which "liberty, equality and fraternity" is only the present-day expression. It undermined the justification of slavery which men had previously accepted, and it prepared the way for the Christian conception of the supreme value of the individual soul. When St. Paul wrote that "there is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female, for ye are all one in Christ Jesus," he was not preaching a new doctrine, he was deepening and giving a religious form to a conclusion about human nature at which the Stoics had already arrived by a process of reasoning, and which they had been proclaiming as a truth of philosophy. Of course, the world has never come near to the realization of this ideal, but, as an ideal, it has never since been wholly lost.

This Stoic "discovery of the individual," as it has been called, opened a new chapter in the theory both of politics and of morals.

The second great principle that we owe mainly to the Stoics is that of the law of nature, that is to say, the notion that there exist principles of justice and order which man can apprehend through that capacity of reasoning with which his nature has endowed him. The wise man, the Stoics said, will endeavour to regulate his life according to the dictates of this law, and by it the validity of all human laws is to be tested. You may think, when the idea is expressed in such bald terms as these, that it is a mere commonplace. But it is not really a commonplace idea, or, if it is, that is because it was taken up into, and has been handed down to us by Christian thought; as when St. Paul speaks of the Gentiles which have no law, but do by nature the things of the law, and thus "show the work of the law written in their hearts." There is an excellent short account of the long and eventful history of the law of nature in Chapter II of Sir F. Pollock's collected *Essays in the Law*.

#### Stoicism Versus Epicureanism

The third trend in later political thought which is probably to be traced to a Stoic origin also has a long history, but its influence has not always been for good. It has been explained how the rise of world empires led to the political impotence of the individual and drove him in upon himself. Philosophers ceased to speculate about forms of law and government and their interest turned to ethics in preference to politics. The Stoics did not deny that, as things were, government was a necessity, and they did not teach, as another school of philosophers, the Epicureans, did, that the good man should stand aloof from public affairs; but they did hold that government had only been made necessary because men had departed from the condition in which nature had intended them to live. Government, therefore, was not part of the true order of nature, but something conventional or artificial. Here again Christianity picked up the thread, for you can easily see how almost exactly this

Stoic doctrine chimes with the Christian doctrine of the Fall of Man, with the belief that it is man's sinfulness that has made the restraints of government necessary to him. This view of the nature of government became one of the leading ideas in the thought of the fathers of the Christian Church, in particular of St. Augustine. There is a convenient translation of St. Augustine's *City of God* in Everyman's Library, with an introduction by Sir Ernest Barker.

#### Influence of the New Testament

You would find it an interesting and instructive task to examine those texts of the New Testament which have some political bearing, for every one of these has had an enormous influence on later thought. One of two of these texts have been referred to already in this Study Guide, but here are some others obviously having implications for the theory of government which deserve to be examined. When, for instance, Christ answered the Pharisees with the words: "Render unto Caesar the things that are Caesar's and unto God the things that are God's"; was he, as has been suggested, repudiating all doctrines of political absolutism? Or when St. Paul described "the powers that be" as "ordained of God," and St. Peter commanded us to "Be subject to every ordinance of man for the Lord's sake," were they proclaiming a duty of obedience to all government however bad? You will find these and other texts discussed in a chapter on "The Political Theory of the New Testament" in the first volume of the Carlyles' *History of Medieval Political Theory* already mentioned, and this or a good commentary will help you to compare the circumstances which were in the minds of the original writers, especially St. Paul, with the meanings that have been read into them and the inferences which have been drawn from them in later political controversy.

We have dwelt very briefly on these trends of Stoic-Christian thought because they were destined to become dominating ideas in political theory for more than a thousand years, and even today their force



is by no means spent. You can see what a great departure they mark from the teaching of Aristotle, especially from his view that the State is "natural" because it is a necessary condition for a full human life. The perennial problem of political philosophy has always been how to reconcile freedom with authority, the claim of the individual to develop his own personality to the full and to regard the State as something which exists for him and not vice versa with the restraints that society inevitably imposes on him through the State. There can be no permanently valid solution of this problem, each generation has to solve it for itself in the light of the circumstances of its age. But Greek speculation, as we have seen, had tended to exaggerate the claims of the State on the individual, and the Stoic-Christian tradition often undervalued them. It is one of the most valuable legacies of medieval thought that it was feeling its way to a true balance between these opposite tendencies.

For all this long period the standard authority is the Carlyles' *History*, already mentioned. It is a great work, in six volumes, to which one of its authors, Dr A. J. Carlyle, devoted almost the whole of the working years of a long lifetime. Naturally it contains a great deal of detail about the writings of medieval authors which only the specialist will be able to appreciate, but the authors never allow this to obscure the main threads running through the story. Every now and then there are chapters in which these are summed up, so that even the inexperienced student can see without much difficulty where history is leading him.

#### View of St Thomas Aquinas

The book begins with an account of the antecedents of medieval political thought, tracing the contributions severally made to it by the Stoics, by the Roman lawyers, by the New Testament, and by the Fathers of the early Church. Then it guides you through the very complicated early medieval period, and leads up to the great change which took place in the thirteenth century with the rediscovery of Aristotle's works and the fusing into one great system of the

two currents of thought, the Stoic-Christian on the one hand and the Aristotelian on the other.

This was mainly the work of St Thomas Aquinas, a selection from whose writings is published in Everyman's Library. He reasserted once more, after it had been forgotten for more than a thousand years, the Aristotelian principle that the State is the necessary form of a full human life and not merely an institution needed by man because of his fall from a state of primitive innocence. But even the great authority of St Thomas could not prevent the opposite notion of the State as something conventional and unnatural from recurring in many later writers. It raises its head again in writers like Hobbes and Locke and other exponents of the social contract theory of the State, and something very like it reappears as late as the nineteenth century in the "police State" of Herbert Spencer.

#### Theories of the Middle Ages

A much shorter book than the Carlyles' *History* and a very useful little book is Professor d'Entreves' *The Medieval Contribution to Political Thought*. This contains a useful note about the literature of the subject and refers you to a few of the best and most accessible books and articles. You might also refer to Professor E. F. Jacob's chapter on political thought in *The Legacy of the Middle Ages* and to the chapters on the same subject by W. H. V. Reade and Professor H. J. Laski in the *Cambridge Medieval History*, Vols VI and VIII. A very useful book for the later part of the period is also J. N. Figgis's *From Gerson to Grotius*.

It is dangerous to generalize about the thought of a period so long as that of the Middle Ages as though all men thought alike. But in general it is true to say that medieval thinkers proclaimed two vitally important truths about politics which we have been in danger of losing in the modern world and which it is essential that we should recover. These are that the authority of the State is always a limited authority, and that the supreme authority in the State is, or ought to be, the law.

There is a close connexion between the two ideas, but let us consider each of them separately.

The Middle Ages were profoundly anti-totalitarian. They could not be otherwise, because authority was in fact everywhere divided between the two powers, the spiritual and the temporal. The long conflict between the Papacy and the Holy Roman Empire, disastrous as it was in so many other respects, did at least prevent totalitarianism from raising its ugly head. Men might dispute endlessly about the respective spheres of the two powers, but they were agreed in assuming as beyond question that the social order must find room for both, and therefore that neither of them could claim the whole of a man's allegiance. It is only after the Reformation, leading as it did to the extirpation from some States and the weakening in others of the independent power of the Church, that the age of absolutism begins in the seventeenth century, and such ridiculous doctrines as that of the divine right of kings begin to be unequivocally asserted. The Church, of course, had not been fighting for liberty, but none the less its fight was one of the factors which fostered the development of modern conceptions of liberty. In the Middle Ages it was impossible for men to feel that the merely political organization of social life could satisfy all the needs of their nature.

The supremacy of law meant that it was law that limited and defined the right of the ruler. A particular ruler might, and of course often did, behave arbitrarily, but he could not claim that it was the law that entitled him to do so, because by common consent it was law that made the ruler and not, as later notions of absolute sovereignty



ST. THOMAS AQUINAS

*St. Thomas's greatest work, the "Summa Theologica," is one of the outstanding philosophical writings of the Middle Ages. He disclosed the views of Aristotle and, with the Greek philosopher, held that the State is necessary for the development of a full human life.*

proclaimed, the ruler that made the law. In fact the Middle Ages did not look on law as something that anyone had deliberately made, but rather as a scheme of rights and duties which somehow embodied those ideas of what was just and proper which had been handed down in the community from earlier times.

The modern counterpart of this medieval idea of the supremacy of law is a constitution, though there are, of course, important differences. The written constitution typical of most States today—with the exception of Britain—is more than an inherited body of thought; it is normally a written document formulating in precise terms the main ideas and precepts which

the nation has deliberately decided to accept and maintain, and it owes its validity not to custom and tradition but to a definite act of creation.

Moreover, the medieval conception of an unenacted fundamental law as the basis of all political organization was reinforced by, and indeed came to be identified with, the philosophical conception of the law of nature which, according to St. Thomas Aquinas, was simply that part of the divine law which had not been revealed, but which man could discover for himself by the use of the power of reasoning with which God had endowed him. The Middle Ages believed, as Professor D'Entrèves puts it in *The Medieval Contribution to Political Thought*, that "authority, whatever its origins, its forms or its aspects, has in itself some element that never is and never can be merely human; that therefore the exercise of power is a source less of rights than of duties, and obedience is due less to man than to principles; that it is the subservience to the divine order of justice which alone can legitimate political rule." One of the most interesting developments of recent political speculation is a growing realization of the need to recover for the modern world and to reformulate in modern terms, not necessarily of course theological, the elements of permanent value which were contained in this conception of the law of nature.

The development of political theory in the centuries between the Greeks and the modern world has here been treated at some length partly because the importance of this period is often underestimated, and partly because it is a difficult period for the student to find his way through unaided. The difficulties of a study guide to the post-medieval theory are different; they lie



MACHIAVELLI (1469-1527)

His work, *"The Prince,"* is an analysis of the methods whereby an ambitious man may rise to power—and the powerful man retain it. He is perhaps the most unscrupulous of political theorists prior to the twentieth century.

mainly in selecting from the vast and for the most part easily accessible literature a few books which the student is likely to find the most useful. Machiavelli's *The Prince* (1513) may be said to mark the real breaking away from the medieval views of political theory. Whether Machiavelli deserved the obloquy which has made his name a byword for bad faith and lack of all moral principle is still a controversial question. There is no doubt, however, that his book, *The Prince*, completely banishes all ethical considerations from the art and practice of politics, and makes its own appeal to minds capable of agreeing with such moral expediency as he shows.

A translation of it is published in the Oxford World's Classics.

In studying modern political thought

you will probably find it useful to start with some of the books which survey the field historically. In that way you will see which are the important writers about whom you may wish to learn more. For instance, there are three useful little books in the Home University Library on *Political Thought in England, From Bacon to Halifax*, by G. P. Gooch, *From Bentham to J. S. Mill*, by W. L. Davidson, and *From Spencer to the Present Day*, by Sir Ernest Barker.

Here, however, is a short list of the books which have most powerfully influenced the development of modern thought about the State. Bodin's *Republic* (1576) contains the first clear statement of the doctrine of sovereignty, but about this it is not necessary to repeat here what has been said in the first chapter of this book. Unfortunately there is no modern edition of Bodin's work. You will find a good discussion of his meaning and importance in McIlwain's *Constitutionalism and the Changing World*, which, incidentally, is also one of the best books written recently about politics.

Hobbes's *Leviathan* (1651), mentioned in Chapter I, is, in spite of all its faults, one of the greatest books about politics ever written. There are convenient modern editions of it, one with an introduction by Pogson Smith, another in Everyman's Library, and the most recent has an introduction by M. Oakshott. Strauss's *Political Philosophy of Hobbes* contains a discussion of Hobbes's doctrine.

Locke's *Two Treatises on Civil Government* (1690) is also published in Everyman's Library, and there is also a recent edition with an introduction by J. W. Gough. This, too, is one of the really important books. Aaron's *John Locke* has a chapter on Locke's political philosophy.

#### Montesquieu and Rousseau

Montesquieu's *Spirit of the Laws* (1748) is more a pioneer work of sociology than a work of political theory, for he was an investigator of political phenomena rather than a philosopher. He was interested in the effects on a people's laws of climate and environment, of their manners and morals, of economic factors. He thought that

political liberty is best safeguarded by a system of separation of powers, that is to say, by a system under which the legislative, the executive, and the judicial powers in a State are exercised by different organs so that each can act as a check and balance on the others. He was led by his study of the English Constitution, which he greatly admired, to conclude that we had reached this desirable condition, but in this he was deceived by temporary circumstances which were soon to be superseded. Today the American Constitution, as you have been told in earlier chapters, does largely conform to Montesquieu's pattern, but the British, chiefly because of the cabinet system, does not.

Rousseau's *Social Contract* (1762) is the next work of outstanding importance, and something has been said of this, too, in Chapter I. There are many English translations and commentaries on this book, including a big edition of *Rousseau's Political Writings* by C. E. Vaughan, a translation in the Everyman's Library, with an introduction by G. D. H. Cole, and *The Meaning of Rousseau* by E. H. Wright.

#### Hegel and Nineteenth century Liberalism

The nineteenth century was a period of very important and diverse movements in political thought, and you might note first the influence of the German Idealist school and especially of Hegel. Hegel's *Philosophy of Right* has been translated by Professor T. M. Knox, but unless you are a professed philosopher you will not be able to make much of it by reading it for yourself. Hegel took over from Rousseau the organic theory of the nature of the State, only in the State can man realize his freedom. He exalted the State in mystical terms of the wildest extravagance, it is "this veritable god", and since between States there can be no judge, only war can settle their differences, a conclusion which Hegel saw no reason to regret. Unfortunately his influence has been deep and lasting. When he spoke of "the State" he really had in mind the Prussian State, and his glorification of nationalism and militarism makes him one of the intellectual forerunners of the exponents of Nazism.

The English idealists of the later nineteenth century were much influenced by Hegel, but they avoided his worst extravagances. H. Green's *Principles of Political Obligation*, a notable work of this school, though not easy reading even succeeded in combining Hegelian influence with the outlook of nineteenth-century liberalism. You should read however, the very valuable exposure of the dangerous tendencies implicit in the whole idealist conception of the State which is given in L. T. Hobhouse's *Metaphysical Theory of the State*, one of the wisest and most readable books on political theory of recent years.

Utilitarianism was mainly an English movement inspired in its beginnings by the works of Jeremy Bentham towards the end of the eighteenth century. The utilitarians were more interested in the practical problems of government than in theories about the State and they were a powerful influence in stimulating the reforms of the early

nineteenth century. Dicey's *Law and Opinion in England* gives a good account of this influence. Of the utilitarians themselves you should read J. S. Mill's *Liberty* (1859), and his *Representative Government* (1861). They are published in the Everyman's Library, and there is also a recent edition with an introduction by R. B. McCallum. Mill held, as all the utilitarians did, that social well-being is the proper end of all government, but that the test of any particular government lies in the quality of the individuals which it produces. He thought that the only legitimate purpose of the exercise of power over the individual is to prevent harm to others. Mill was right to emphasize the supreme importance of the individual, but it does not follow, as he seems to have thought, that it can best be protected by the principles of individualism. He underestimated the measure in which men are socially dependent one on another. Henry Sidgwick, whose work, *The Elements of Politics*, was the standard textbook a generation ago, was of Mill's school of thought.

Lastly among the nineteenth century movements one is not likely to forget today the origin of revolutionary communism in the *Communist Manifesto* of Marx and Engels in 1848 with its doctrine that "hitherto every form of society has been based on the antagonism of oppressing and oppressed classes." You can read this in either of two useful collections of documents illustrating modern political tendencies, Oakeshott's *Social and Political Doctrines of Contemporary Europe*, or Zimmern's *Modern Political Doctrines*.

#### Modern Views on the State

The political literature of our own generation is so vast that any selection is very arbitrary. Two books however that should certainly be read are MacIver's *The Modern State* and Barker's *Reflections on Government*. MacIver's book is particularly good on the relation of the State to other associations, on the place of force in government, and on the social purposes which the State exists to promote. Barker's book is more discursive. It is a fascinating summary of his thoughts on the problems



JEREMY BENTHAM

He advocated "the greatest good for the greatest number" as the highest practical aim of government.



## KING'S JUSTICE

*In early mediæval law the king's court was one over which he himself presided. In this manuscript painting we see him, with the symbols of spiritual and temporal power grasped in either hand, among his judges. Justice has been administered and the criminal is hung.*

of democracy, and the alternatives to democracy offered by the single-party State in its three manifestations of Bolshevism, Fascism, and Nazism, on the parts respectively played in the British system by political parties, the Electorate, Parliament, and the Cabinet, and on methods by which the superficial conflict in democratic theory between government by discussion and the rule of the majority can be reconciled.

Laski's *Grammar of Politics* is also a book which you cannot afford to neglect; though you may wonder whether he would still say, as he did when writing it in 1925, that "for Western Europe at least, democratic government has become a commonplace beyond discussion." For there is no doubt that today democracy is on the defensive, and it is very necessary that its champions should be able to give reasons for their faith. In this connexion read Lord Lindsay's *Modern Democratic State*. It deals with democracy not as a theory or ideal of government, but with the historical factors, the "operative ideals" as the author calls them, which have led to the development of a distinctive type of State in Western Europe, North America, and the

British Dominions. Thus it combines in an instructive way the philosophic and the historical approaches to an understanding of the system under which we live today. In a second volume Lord Lindsay intends to deal with the actual working of the modern democratic state. Two other useful little books on democracy are R. V. Lennett's *Democracy*, and C. K. Allen's *Democracy and the Individual*, the burden of which is that democracy will only be able to meet the challenge which confronts it if it can produce men who think less of their own claims on the community and more of the claims of the community on themselves. One of the dangers of the modern social service State is that it tempts us to forget that the State cannot be a sort of universal Santa Claus showering presents upon us without also receiving our service. In the last analysis, whatever service the State renders us is paid for by the wealth which we ourselves produce.

Lastly, you might investigate a book which does not profess to be a book about politics, but which is full of good sense about politics as well as about other things. It is called *The English Way* and the author is a Frenchman, Pierre Maillaud.



BUCKINGHAM PALACE

*The London home of the reigning sovereign of Great Britain seen through the eyes of an early nineteenth-century artist. The palace was built in 1703 and bought by George III in 1762*

### Part 3—Political Institutions

#### 1. BRITAIN

British law and government is such a big and complicated subject that we must not expect to find any single book covering the subject with any approach to completeness. The most comprehensive single work, *The Government of England*, by A. L. Lowell, formerly President of Harvard University, was written in 1908, that is to say, before the immense increase of government activity and the development of subordinate legislation and administrative jurisdiction which had their beginnings in the great social reforms introduced by the Liberal Government of Mr. Asquith which took office in the same year. It is, moreover, primarily concerned not with the law of the constitution, but with political and administrative organization, and at a time when the country was still governed by a combination of landowners and professional and business men, and before the Labour Party had begun to be a strong force even in local government. Yet the antecedents of the present system are so important that the book remains indispensable; it has certainly not been replaced.

An even earlier classic, Walter Bagehot's *English Constitution*, is also indispensable as an analysis of political organization,

though it dates from a period before the Reform Act of 1867 had started the process of democratization. On this side, the modern classics are Dr. Ivor Jennings's books on *Cabinet Government* and on *Parliament*. Shorter books are *The British Constitution*, also by Jennings; one on Parliament in the Home University Library, by Sir Courtenay Ilbert, who wrote with the great authority of one who had been chief parliamentary draftsman and was at the time Clerk to the House of Commons, and two very recent and readable little books, *The Purpose of Parliament*, by Quintin Hogg, and *Thoughts on the Constitution*, by L. S. Amery. There is no adequate account of central administration; and probably the best advice that can be given to the beginner is to supplement Lowell with Herman Finer's *Theory and Practice of Modern Government*, though this is a comparative work ranging over other systems besides the British and *Our Parliament*, by S. C. Gordon, published by the Hansard Society, is also well worth reading.

On local government the best books are probably Jennings's *Principles of Local Government Law*, and a volume in the Home University Library, *Local Government*, which is concerned more with prac-

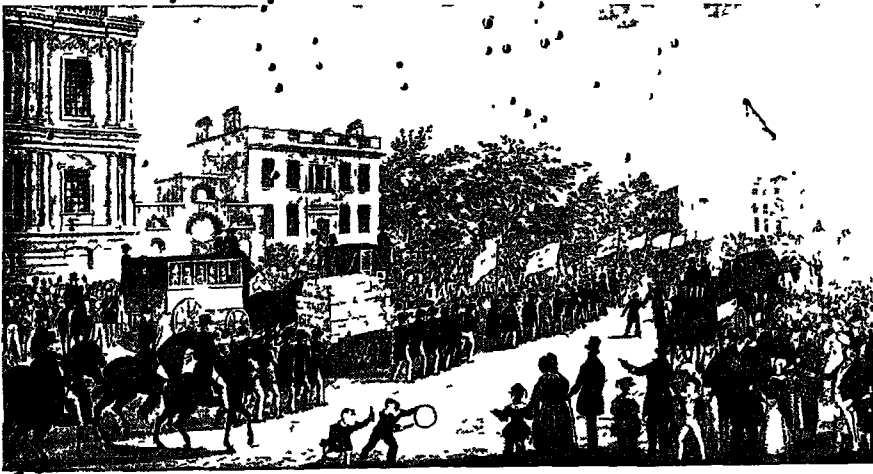
tion with law, by J. P. R. Maud, now the Permanent Secretary to the Ministry of Education. A fuller student's textbook is Hart's *Introduction to the Law of Local Government, and Administration or The English Local Government*, by J. H. Warren.

No clear line can be drawn between politics, administration and law; and though it is perhaps best to start with books describing the two former, those on constitutional law usually contain much which is not strictly speaking law. A leading students' textbook is Wade and Phillips's *Constitutional Law*, which has a good skeleton bibliography. The classical work is, however, still A. V. Dicey's *Law of the Constitution*, a brilliant book in the Whig tradition, which you should read in the ninth edition of Professor Wade, who has brought it up to date and corrected some misconceptions of the original author. You will also find an acute criticism of Dicey in Jennings's *The Law and the Constitution*, which has to some extent replaced Dicey for the present generation. Useful source material is to be found in Keir and Lawson, *Cases in Constitutional Law*, and

in C. S. Emden's *Selected Speeches on the Constitution*, in the World's Classics. Mr. Emden has also, in *The People and the Constitution*, made a valuable study of the ways in which public opinion is brought to bear on government. Other books on this subject are *Concerning English Administrative Law*, by Sir Cecil Carr; *Delegated Legislation*, by the same author; and *The Constitutional History of Modern Britain*, by D. L. Keir.

Lastly, mention must be made of F. W. Maitland's great *Constitutional History of England*, not perhaps a very easy book for the beginner, but if you have already a general knowledge of the course of English history from some such book as Trevelyan's *History of England* you will not find it too difficult.

It would be out of place here to mention any books of a technical character about the English legal system, but you can get a good general idea from such books as Radcliffe and Cross's *The English Legal System*, *English Courts of Law*, by H. G. Hanbury, or Geldart's *Elements of English Law*. The latter two books are



CHARTISTS DEMONSTRATING FOR THE RIGHT TO VOTE

Long agitation and political struggle accompanied the step-by-step extension of the suffrage in the British Isles. Demands for political changes reached their height in the early days of Victoria's reign, and among the organizations claiming recognition of their reforms were the "Chartists." The illustration is after a contemporary engraving showing the procession, which led to the presentation of the Charter of 1842.





JUSTICES MEETING

This contemporary print shows eighteenth-century magistrates during a court session amid the comforts of the local inn. The defendants on the left are making a vigorous explanation.

published by the Home University Library.

Two books which will tell you what law is all about are Pollock's *First Book of Jurisprudence*, and Vinogradoff, *Common Sense in Law*, this latter also in the Home University Library. Mr. Leo Page has written several good books on the magisterial system, *Justice of the Peace, For Magistrates and Others*, and *Crime and the Community*, especially if you happen to be a magistrate, you will find these books most helpful to you in your work. Other useful books which also bear on magisterial duties are Miss Elkin's *English Juvenile Courts*, Dr. A. E. Morgan's *The Needs of Youth*, and the *Handbook of Probation* published by the National Association of Probation Officers.

## 2 BRITISH DOMINIONS AND DEPENDENCIES

On the Dominions the standard book is Keith's monumental *Responsible Government in the Dominions*, but this is very much a book for the specialist. Then, of course,

each Dominion has a large literature of its own, and you will find a useful guide to these literatures in the short bibliography appended to Professor Basil Williams's *The British Empire* in the Home University Library. That book is itself a good short history of the Empire from its early beginnings, and there is another by J. A. Williamson, *Great Britain and the Empire*. Lord Elton's *Imperial Commonwealth* gives a fuller account, and it contains useful short bibliographies referring the reader to other books on special parts of the story. Professor Wheare, the author of the chapters in this book on the Dominions and on the Dependencies, has written two books, *The Statute of Westminster and Dominion Status* and *Federal Government*, which will help you to understand the present position and some of the problems of the Dominions. Another book for study is that by A. C. Brady, *Democracy in the Dominions*.

Professor W. K. Hancock's *Survey of British Commonwealth Affairs* in three

volumes is a work of comparable importance to that of Keith just mentioned but it is concerned more with the political and economic problems of the Commonwealth than with institutions. But you must not miss a very different book by the same author, *Argument of Empire*, in the Penguin series, it is a little masterpiece which will show you how remote from the truth are the two opposite but equally sentimental schools of thought about the empire, those who boast of "the Empire upon which the sun never sets" and those who suppose that anything which can be dubbed "imperialism" is thereby proved an abomination which they need make no effort to understand.

There is one other important book on imperial problems worthy of mention, Lord Hailey's great *African Survey*. It deals with Africa south of the Sahara, both with its problems of government and with social problems, labour, agriculture, health, education and so on.

### 3 INDIA

The most comprehensive of recent histories of India is the *Cambridge History of India*. Volume V deals with British India 1497-1858, and Volume VI with the Indian Empire, 1858-1918. These volumes also form Volumes IV and V of the *Cambridge History of the British Empire*. There are, of course, many shorter histories, such as the *Cambridge Shorter History of India*, a *History of India* by Sir George Dunbar, published as recently as 1944 and giving a reliable and comparatively brief account of the known history of India, a *History of British India Under the Company and the Crown*, by P. E. Roberts, also a reliable book, but covering, as the title implies, a shorter period, and *A Short History of India*, by W. H. Moreland and Sir Atul Chatterjee, which is an excellent, though necessarily condensed, history, devoting much attention to the earlier periods, but in the later editions bringing the story almost up to date.

*Modern India and the West* is a study of the interaction of the two forms of civilization. It is edited by L. S. S. O'Malley, and consists of chapters by a number of writers

of authority on religion, law, education, the Press, the position of women and other subjects. A shorter book, giving a popular and brightly written account of the Indian people today, is Lady Hartog's *India in Outline*.

The books so far mentioned are from the point of view of Indian law and government, background books. The following bear more directly on the constitutional problems of today. Two important official documents are the *Report on Indian Constitutional Reform* by F. S. Montagu and Lord Chelmsford sometimes called the "Montford" Report. This was published in 1918, and preceded the reforms of 1919. It gives a good picture of Indian life and administration prior to that date. The other is the report in three volumes of the *Indian Statutory Commission* (the Simon Commission) which led up to the reforms of 1935. This, too, gives an excellent summary of life and administration in India.

Unofficial works dealing with the present problems are a book by Lord Halifax, formerly Viceroy of India, *The Indian Problem*, which was written during the recent war mainly to inform the people of the United States of the difficulties of transferring rule to Indian hands. On a larger scale is Sir Reginald Coupland's *Report on the Constitutional Problem in India* in three volumes. The first volume covers the period from 1833 to 1935, the second, that from 1936 to 1942, and the third suggests a possible solution. This work, which is thoroughly sound and authoritative, is the best available approach to the problem as it stood when power was handed over. It should be supplemented by the same author's later account of *The Cripps Mission*.

During the war the Oxford University Press published pamphlets on various aspects of Indian affairs which though brief, are informative and sound. The same Press also publishes a little book *India*, by T. A. Raman, an Indian journalist of nationalist sympathies, but objective in his approach to the history and political problems of his country. Lastly there should be mentioned Sir Edward Blunden's *The I.C.S.*,

which gives an excellent account of the Indian Civil Service, its history and methods of work

#### 4 UNITED STATES

The political institutions of the United States can only be fully understood against the background of American history and the present day conditions of American life. Many excellent histories are now available for the British reader; a short introduction is to be found in *A Brief History of the United States* by Allan Nevins and a somewhat longer treatment in *America, the Story of a Free People*, by Allan Nevins and H S Commager. Both these are admirably fair and readable accounts. *The Epic of America* by James Truslow Adams is an extremely readable impressionistic survey. More extended books are *The Oxford History of the United States* by S E Morison, and *The Growth of the American Republic* by S E Morison and H S Commager. Though a slightly tendentious book *The Rise of American Civilization* by Charles and Mary Beard is also to be recommended. Most of these books bring the story up to modern times, but for contemporary history reference may also be made to *Only Yesterday* by F L Allen, an informal but reliable document of the twenties, and *Since Yesterday* by the same author, which covers the thirties. *American Interpretations* by David Mitrany is a series of essays on New Deal America.

*USA* by D W Brogan is the best pocket guide to the contemporary American scene. The same author's *The American Problem* probes at greater length and with more detail into some present-day American problems. His *The American Political System* is the best account by a British author of the working of twentieth century American politics, but some allowance must be made for the fact that the book antedates the reforms of the New Deal. An earlier English observer, James Bryce, wrote what is still the greatest work on American institutions, *The American Commonwealth*; it remains an indispensable fund of wisdom, experience and information. The searching analysis of the implica-

tions of democracy which De Tocqueville composed in the 1830s after his visit to the U S A, *Democracy in America* is a classic whose value has not diminished with time.

Particular aspects of American political institutions can be studied in greater detail in *The Constitution and What It Means Today*, by E S Corwin. *The Senate* by Lindsay Rogers, *This is Congress* by Roland Young, *The American Presidency* by Harold Laski, *The President, Office and Powers* by E S Corwin, and *The Supreme Court and the National Will* by Dean Alfange.

Most of the leading newspapers carry reliable accounts of developments in American government and institutions. *The Economist* in particular devotes much space to well-informed comment on American affairs.

#### 5 EUROPEAN DEMOCRACIES

President Lowell, the author of the book on *The Government of England* already mentioned, wrote an equally useful book on *Governments and Parties in Continental Europe*, but unfortunately this is now very much out of date and a new book on the same comprehensive lines to take its place is much needed. But two books that you will find useful are Buell's *Democratic Governments in Europe* and Sir Ernest Simon's *Western Democracies*. The most important recent book on France is Professor Brogan's *Development of Modern France (1870-1939)*, though this is a political history of France during that period and not, except incidentally, an account of French political institutions. On this latter aspect you should read *Democracy in France* by Mr David Thomson, the author of Chapter XII in this book. There has not yet been time for a book to be written on the new Constitution which has come into force in France while this book has been passing through the press, and for the present you will have to rely for information about this on articles in journals and newspapers. You may also find useful a series of books which the University of California is publishing on the United Nations, those on Belgium and



#### MODERN CONSTITUTION

Reproduced above are the cover, title page and frontispiece of the constitution of 1936 on which the government and law of the U.S.S.R. are based.

the Netherlands have already appeared, and they contain well-informed chapters dealing with the political institutions and parties in those countries.

#### 6. SOVIET RUSSIA

Grierson, *Books on Soviet Russia* (1917-42), gives a full list of books in English on Law and Government in the Soviet Union, and this bibliography is to have an annual supplement in the *Slavonic Review*. The first of these appeared in January, 1946, and covers books published between 1942 and 1945. There are many English editions of the three basic documents, the Constitution of the R.S.F.S.R. of 1918, and the U.S.S.R. Constitutions of 1923 and 1936. Fundamental to an understanding of the subject are the works of Lenin, particularly his *State and Revolution*, and the works of Stalin, particularly his *Leninism*

and his *Marxism and the National and Colonial Questions*. A full list of translations of these and of other works by Soviet leaders is to be found in the Grierson bibliography.

The best general introduction to the subject is S. N. Harper, *The Government of the Soviet Union*, but this relates to conditions a decade ago and must be revised in the light mainly of periodical literature. The same is even truer of Sidney and Beatrice Webb's *Soviet Communism, A New Civilization*, originally published in 1936. In view of the continuous process of change and development the most satisfactory approach is probably the historical one. This can best be begun by the reading of W. R. Batsell, *Soviet Rule in Russia*. Useful but to be used with caution is F. L. Schuman, *Soviet Politics at Home and Abroad*.

There is useful matter in all the following works, but in each case the date of the

work should be noted. de Basily, *Russia Under Soviet Rule* (1938); W. H. Chamberlin, *The Russian Revolution* (1917-21), (1935); *Soviet Russia* (1930); *Russia's Iron Age* (1935); D. J. Dallin, *The Real Soviet Russia* (1944); M. T. Florinsky, *Towards an Understanding of the U.S.S.R.* (1939); Sir John Maynard, *The Russian Peasant and Other Studies* (1942); R. Schlesinger, *Soviet Legal Theory* (1945); A. Werth, *The Year of Stalingrad* (1946); B. H. Sumner, *Survey of Russian History* (1944).

The administrative divisions, etc., of the U.S.S.R. as they stood in 1939 are given in S. P. Turin's *The U.S.S.R., an Economic and Social Survey*.

#### 7. CHINA

The chapter of this book on Law and Government in China shows that to under-

stand the present difficulties of establishing a stable and efficient government we have to know something of the character of the imperial government which the revolution of 1911 destroyed. If you start from scratch, as most Westerners have to do with a people so different from ourselves as the Chinese, you might read first a little pamphlet on China by Professor Roxby in the series of Oxford Pamphlets on World Affairs. Then you might read G. F. Hudson's *The Far East in World Politics*, which deals with the impact on the Far East of the policies of the Western Powers during the last hundred years or so. One of the incidents of that impact was the jurisdiction which those powers used to exercise in China, and on that you might refer to Professor G. W. Keeton's *The Development of Extraterritoriality in China*, which will show you that although the system was in many ways unsatisfactory, and although the Chinese came to regard it as humiliating to their national pride it was probably a condition without which intercourse between China and the West would have been impossible.

Professor Keeton has also written about the rise of Chinese nationalism and the problems which are now waiting to be settled in the Far East in *China, The Far East, and The Future*. A useful general history of China is Latourette's *The Chinese, Their History and Culture*.

There is an immense contrast between the Chinese and the Western approaches to the problems of law and government, and a little book by Professor W. W. Willoughby, *Constitutional Government in China*, brings out the points of this contrast very clearly. Unfortunately, this book, which was published in 1922 by the Carnegie Endowment for International Peace, is not easy to come by, and it may therefore be useful to mention here some of the matters to which it calls attention. They help us to understand some of the difficulties against which the new regime has had to contend.

One thing to note is the very small part that government in the Western sense has played in the lives of the Chinese people. The huge size of the country and difficulties

of communication have made continuous central control impossible even if the Chinese people had ever felt the need for it which they did not. In theory there was no limit to the powers of the emperor, he was "the Son of Heaven," the final authority in every field of government, legislative, administrative, and judicial. But in practice he rarely made laws, he appointed governors and the higher officials in the provinces, and issued mandates to them which were mostly either directions for them to follow in their administration or particular decisions on specific matters. Provided that an official remitted certain required taxes to the central government and kept his people reasonably contented he had almost complete freedom to do what he liked in his district.

Another point to remember is that China is a country of innumerable villages, and that in local affairs each village has been ruled by the village elders, it was a self-governing unit, not forming a part or subdivision of any general national system of administration. "In the sense that they are not," says Professor Willoughby, "in their everyday affairs, subject to regulations created and enforced by law, the Chinese are one of the freest peoples on earth."

Still another point of contrast is the absence in imperial China of anything which really corresponds to the Western conception of law. Not only did the emperors rarely legislate, but their occasional mandates were often more in the nature of exhortation or advice than of commands. Conduct was regulated by custom, and people were encouraged to submit their disputes, not to courts of law but to arbitration, by heads of families by village elders, or by trade guilds. No independent judicial system was developed, no body of judges learned in the law, no profession of lawyers. A Western lawyer would classify such law as did exist as criminal, not civil, for instance, physical punishment was the method of enforcing a debt.

It is natural to ask how, with so little government, the unity of China was preserved through so many centuries. The



#### DIPLOMATS OF TIMES PAST

*Three and a half centuries ago as in our own day wars were followed by conferences and treaties. The illustration is after a contemporary painting of the English, Spanish and Flemish plenipotentiaries who met in Somerset House in 1604 at the call of James I to bring the war begun in 1585 between England and Spain to a peaceful conclusion.*

answer, though to Westerners it may seem a strange one, seems to be that the strongest bond of union has been moral and cultural and not political. Confucianism has been both a great unifying and a great conservative influence, so has the State examination system, which enlisted the best available talent in the service of the

established order and also helped to preserve uniform cultural standards throughout the country. Hence when discontent has arisen, it has not generally led to demands for a radical change in the political system but to complaints against particular rulers who were considered to be inefficient or tyrannical.

#### Part 4—International Law

On international law the standard book for specialists is Oppenheim's *International Law* in two big volumes. The author of this chapter has written two little books which are intended for the beginner, and more especially for the non-lawyer who wants to know what international law is all about and what the world may expect from it. One of these, *The Law of Nations*, gives a

bird's-eye view of the law of peaceful relations between States and the other, *The Outlook for International Law*, deals with the difficulties which obstruct the further development of the rule of law among States and the conditions which we shall somehow have to create if we are to live in a more law-abiding world. A more ambitious book on a somewhat similar

theme is Professor Lauterpacht's *Function of Law in the International Community*. Of course, on this, as on all the subjects of this book, there is a large specialist literature, but the only book of that kind that need be mentioned here is Professor Manley Hudson's *The Permanent Court of International Justice*, which gives a full account of the organization and work of the World Court. Periodical literature is particularly important in a subject which develops so rapidly as international law does, the standard British periodical is the *British Yearbook of International Law*.

The best introduction to the problem of getting the nations to work together is still a book which was written during the First World War, Mr Leonard Woolf's *International Government*. Much, however, has happened since this book was written, and anyone who wants to judge the prospects for the future must study the attempts to promote international co-operation during the two wars and try to see how far and why they failed. For the League of Nations you might refer to Lord Cecil's *Great*

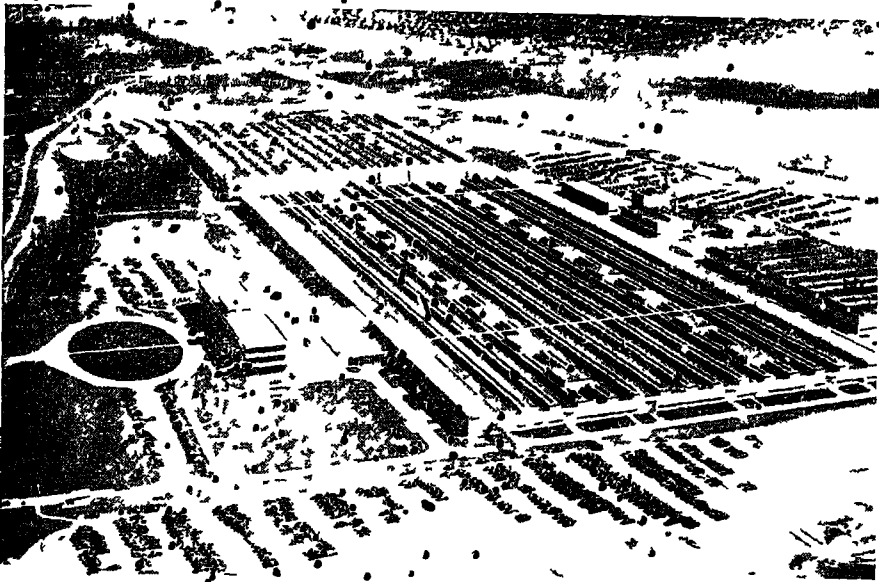
*Experiment*, and on the labour side to Mr. John Price's *International Labour Movement*, and for the general course of international relations to Mr Gathorne-Hardy's *Short History of International Affairs*, 1920-39.

The books published under the auspices of the Royal Institute of International Affairs are many of them indispensable to the serious student. These include a *Survey of International Affairs* in annual volumes, and two journals, a quarterly, *International Affairs*, and a monthly, *The World Today*, besides many books on special international problems. There are also numerous more popular publications, many of which are useful for helping those who cannot be specialists to follow contemporary events in foreign affairs intelligently. For instance, during the war the Oxford University Press published about seventy *Pamphlets on World Affairs*, each written in a popular form by a specialist on its subject, and the British Society for International Understanding publishes three series of *British Surveys* containing background informa-



ST JAMES'S PALACE IN 1800

Ambassadors from foreign countries are still accredited to the Court of St James's



#### TEMPORARY UNO HEADQUARTERS

*The site at Lake Success, Long Island (in New York State), chosen as the temporary headquarters of the United Nations Organization, is viewed from the air in the photograph above. The Administration Building is seen left center.*

tion about foreign countries or subjects of international importance, one of these series is intended for schools.

Finally, a word of warning about the study of international relations generally, they are concerned with facts which often seem rather remote from the ordinary daily interests and experience of most of us. But this does not mean that they are simple, or that our conclusions will have any value if they are not soundly based upon the facts. Unfortunately, that is exactly what too many people assume, though often quite unconsciously.

When you are dealing with international

relations, it is more difficult, but it is just as necessary as when you are dealing with political affairs in other fields, to remember that your real subject matter is not any abstraction of States or laws or governments, but men and women and the way they think and behave, and that men and women, who have behind them centuries of history, and traditions very different from our own, often think and behave in ways which to us are exceedingly strange and disconcerting. Forgetfulness of this simple fact is the source of much unnecessary misunderstanding and friction and a deterrent to stability in world affairs.



# ANSWERS TO "TEST YOURSELF"

The purpose of most of the questions is to enable you to discover how closely you are following the text of the book. Few persons can assimilate all the main facts at a single reading and there is no cause for discouragement if your answers show that you have forgotten many of them. What is worth remembering is worth a second and, if necessary, a third reading.

## CHAPTER I

1. That government is justified because men have agreed to place themselves under it in order to secure the advantages which it gives them

2. That man is by nature an individual isolated from his fellows, and accordingly his social relations are something which he can either accept or decline whereas in fact man is by nature an individual in society

3. Settled and binding rules which are general in their application

4. The "Philosopher King," that is to say, an autocrat both wise and benevolent

5. That it is never possible to ensure that the autocrat will possess or retain these qualities, and even if it were, there would remain the even more fundamental objection that such a system treats men as mere objects of the bounty of governments, and not as active members of the State each with his own contribution to make to its welfare

6. To prevent social confusion, e.g. the rule of the road, which is ethically neutral, is necessary to prevent traffic congestion and accidents

7. A State in which the authority of all who bear rule is defined and limited either by law, or, as in Britain, by tradition and convention as strong as any law

8. Bodin's sovereign is the highest legally constituted authority in the State. Hobbes's sovereign is the strongest power, whose right to rule depends, not on the law, but on his might

9. Because the motives which have led other nations to reduce their constitutions to writing have been absent from British history. There has been no violent break in Britain's constitutional development (apart from the short interval of the Commonwealth in the seventeenth cen-

tury), to compel the making of a fresh start, and it has never been thought necessary to set formal limits by law to the powers of the British sovereign Parliament because the dislike of arbitrary rule was so strong and general that public opinion was considered sufficient political safeguard against any abuse of those powers

## CHAPTER II

1. No. The actual work of government is specialized work and is necessarily placed in the hands of a few

2. It may be expressed in various ways, but here are some possible formulations from different points of view. Democracy holds that every human being ought to count as an individual in his own right within the State. Democracy insists that the State is not the only aspect, but only one amongst other aspects of the life of a society. Democracy holds that all those who exercise the powers of government should be accountable to the people as a whole for the use to which they put them

3. Totalitarianism, the theory that the State is all in all in the life of men, and that, except as a member of the State the individual has no value

4. They teach men to discuss, and thus to understand each other's points of view, to seek for elements of agreement rather than to emphasize differences, in short, to work together for a common purpose. Democracy can succeed only when men have learned this lesson.

5. That despotism, even if it is enlightened and efficient, treats the individual as merely an object of government, and therefore can never call out the highest capacities of human nature

6. No. Representative democracy is to be preferred on its own merits, because, instead of asking the people as a whole to

do the work of actual government, for which most of them have neither the time nor the skill nor the inclination, it gives them functions in the machinery of government which they are qualified to perform, in particular, those of pronouncing on the broad issues of politics and of choosing those by whom the work of government is to be done

7 Because government cannot be democratic unless it is exposed to criticism, and criticism cannot be effectively brought to bear unless it is organized

8 No Majority rule will not produce democracy if the majority and the minority are divided by some permanent factor, such as race or religion or some fundamental disagreement as to the system of government

9 That the criticisms commonly made against democracy e.g. that it is inefficient, that it fails to produce great leaders or to pursue consistent policies, or that it easily degenerates into demagoguery, are just as often true of a non democratic government as they are of democracy

10 Though the term is itself misleading, it expresses a demand, which is not unreasonable, for greater public control over the exercise of private economic power. But to secure this is one of the tasks of political democracy

### CHAPTER III

1 That there are no legal limits to the powers of Parliament, and consequently that no court of law can ever declare, as can an American court with an Act of Congress, that an Act of Parliament is unconstitutional and therefore not to be enforced

2 The maximum duration is five years under the Parliament Act of 1911

3 He or she must be of full age, not subject to any legal incapacity, and qualified by residence in a constituency. Formerly, there were special qualifications for occupiers of business premises, worth at least £10 a year, and holders of a university degree

4 Political understandings which ensure the smooth working of the legal Constitution. Not having the rigidity of legal rules,

they can be adapted easily, and sometimes almost insensibly, to suit changing political conditions

5 The modern tendency to regard the function of members of Parliament not as representatives chosen by the electors to judge on their behalf and to decide issues of policy as they think fit, but as delegates pledged to support the programme of a particular political party

6 Some questions are put merely to obtain information, others in order to enable a minister to explain his policy, and others, again, to call attention to some abuse, or alleged abuse, in administration

7 (a) First reading, which is normally a pure formality (b) Second reading at which the general principles of the bill are debated (c) Committee stage in which the detailed provisions are considered and amendments proposed (d) Report stage, in which the bill as amended is reported to the House, and further amendments may be made, and (e) Third reading, at which the House decides whether it will accept the bill in its final form. The bill must go through these stages in both Houses and finally receive the royal assent

### CHAPTER IV

1 The government account with the Bank of England, into which all government moneys are paid and from which they are drawn out. It was started by the younger Pitt

2 The Comptroller and Auditor-General

3 The rights and powers conferred on the King by the Common Law for the purpose of governing the country. Except in so far as it has been curtailed by Acts of Parliament, the prerogative today is exercised on the advice of ministers

4 Because otherwise a standing army or air force would become illegal. The practice dates from 1689, when the existence of the army was prolonged for one year because it was expected that when peace was made it would become unnecessary

5 The fact that the King was able to establish his power over the whole country at a very early date in comparison with other countries, and that he could not do

this by establishing a strongly centralized administration, but only by using the important men in a locality and leaving to them wide discretionary powers within the law.

6. Into administrative counties and county boroughs, the former being subdivided into municipal boroughs, urban districts, and rural districts.

7. Councillors are elected by the local electors for a term of three years. Aldermen are elected by the councillors for six years.

8. The means are partly judicial, partly administrative. The courts of law will see that local authorities do not exceed their legal powers and that they fulfil their legal duties. Government departments exercise some control by a system of inspection, by approving the appointments of some local officials, by an audit of their accounts, by hearing appeals in certain cases against their decisions, and especially by the system of "grants in aid."

9. The fundamental reason is that a department is not a business, nor at all like one. Even a small mistake may have far-reaching and expensive consequences for the country, and the head of a department, unlike the manager of a business, must be ready at any time to explain and defend publicly any of its actions.

10. They are made by local authorities, and by public utility companies under powers conferred on them by the law, and confirmed by a government department.

#### CHAPTER V

1. A writ by which a judge of the High Court orders a person holding another in his custody to produce the body of the latter in order that the lawfulness of the custody may be investigated. It makes it impossible for the government or anyone else to detain a person for more than a short time without the authority of the law.

2. That what the ordinary man is bound to obey is not the orders of his government as such, but only the law. The converse maxim of government is "reason of state."

3. It put an end to press censorship and thus made the development of a free Press possible.

4. In 1936, by the Public Order Act.

5. At Common Law riot is only a misdemeanour; but the Riot Act of 1714 made it a felony (and, therefore, at that date, punishable by death), if twelve or more persons do not disperse within one hour after a magistrate has read a proclamation contained in the Act (not the Act itself), calling on them to disperse. This does not mean, as is sometimes wrongly supposed, that troops may never fire on rioters until the hour has elapsed, nor that they may always do so after it. To fire on rioters is legal at any time if it is absolutely necessary in order to suppress the riot, but not otherwise.

6. A theory, which has had important effects on government in the United States and in France, but little effect in England, that the maintenance of freedom depends on the legislative, the executive, and the judicial powers of government being kept distinct and vested in different authorities.

7. When used as a technical term the phrase refers to a system, such as prevails in France, under which the individual seeks redress from the government not in the ordinary courts of law, but in special courts having experience of administrative problems but acting in a judicial spirit. It avoids the dangers of the English practice of entrusting judicial or quasi-judicial functions to government departments.

8. Certain obvious and elementary principles which the courts will always uphold unless an Act of Parliament has precluded them from doing so, such as that no one ought to be a judge in his own cause, and that no one's rights ought to be adjudicated upon without his having an opportunity of presenting his own case.

9. The distinction is often convenient, but it cannot be a hard and fast one, for one kind of liberty shades into another. Thus we need political liberty in order to safeguard civil liberty, and as a principal means of achieving economic liberty.

#### CHAPTER VI

1. The early kings enforced their authority by sending the royal judges round the country, and the law that these judges applied was called "Common" because it

was the same everywhere, in contrast to the local customary laws which varied in different parts of the country.

## 2. Roman and English Law.

3 In the fifteenth century the king's chancellor began to use his power to correct injustices which seemed to him to be created by the too rigid application of the Common Law. In time the principles on which the chancellor would act came to be settled, and thus the chancellor, that is to say, the administrative officer of the chancellor, became converted into a court. This body of principles is Equity, and today it is as much a part of the law as the Common Law itself. But until 1873 it was administered in a separate system of courts.

4. That, although in law (that is to say, according to Common Law) A may be entitled to a right, yet sometimes Equity will say that he holds this right "in trust" for B, that is to say, Equity will compel him to exercise it only for the benefit of some other person or for the furtherance of some particular object.

5 The Chancery Division, the King's Bench Division, and the Probate, Divorce and Admiralty Division.

6. In a county magistrates are the judges, in a borough a magistrate appointed to be Recorder of the borough, on the recommendation of the Home Secretary, is the single judge.

7. The function of the judge at an English criminal trial is to see that the trial is conducted according to the rules. He is not an investigator charged by the State to discover the truth or otherwise of the accusation. It is for the jury to judge of that after hearing the evidence and the arguments of both sides.

8. The House of Lords. In the theory of the Constitution, it is the same body as the Upper House in Parliament, but in practice the only lords who sit when the House acts as a court of law are properly qualified judges.

9. Mainly because we have never been convinced of the advantages of codification, and we have not had the special reasons which have induced most other nations to codify their laws—in particular,

we have not needed a code in order to unify English Law because it was made uniform over the whole country by the action of the king's judges about seven hundred years ago.

10 Since the trial of William Penn in 1670.

11 The Act of Settlement, 1700, provides that they can be removed by the King only on an address by both Houses of Parliament.

## CHAPTER VII

1. About 99 per cent

2. Two. Stipendiary or professional magistrates, and unpaid lay justices of the peace. The latter are far the more numerous.

3 With the Metropolitan Police Act of Sir Robert Peel of 1829. That is why policemen used to be called "peelers" and are still called "bobbies."

4. Magistrates try the less serious offences, in the more serious cases, they hold a preliminary examination, and decide whether the accused shall be committed for trial by a higher court.

5 At Quarter Sessions.

6 Nearly half

7 They can make an order for judicial separation, but not for divorce.

8 An institution with some of the restraints of a prison and some of the discipline of a public school, to which Quarter Sessions may commit young persons of criminal tendencies of between the ages of 16 and 23. The aim is to inculcate the elements of good citizenship.

## CHAPTER VIII

1 A former British colony which has now become completely independent without, however, ceasing to be a member of the British Commonwealth: Canada, Australia, South Africa, New Zealand, India and Pakistan are Dominions.

2 Before the Statute, the independent status of the Dominions rested on convention. The Statute of Westminster gave it the form of law.

3. Because racially a majority of South Africans are not of British stock.

4. South Africa and New Zealand have

unitary governments, Canada and Australia, federal

5 Because if the Canadian Parliament could change the Constitution it could alter the powers of self-government which the Provinces enjoy under the Constitution, and this Canadians and especially French Canadians do not wish that it should be able to do. In practice, however the British Parliament only amends the Canadian Constitution at Canada's request.

6 In Canada the "residuary powers", that is to say, the powers of government not expressly mentioned in the Constitution, belong to the federal government. The federal government, too, has certain powers of control over the governments of the Provinces. In Australia, the residuary powers belong, as they do in the United States, to the States' governments, and the federal government has only the powers which the Constitution expressly confers on it.

7 The Judicial Committee of the Privy Council, sitting in London. But the Dominions can abolish or restrict this right of appeal if they wish and some of them have in fact, restricted it.

8 The existence of a large majority of coloured people in the population.

9 They are all democracies of the parliamentary type, that is to say, they have all followed the model of British Cabinet government and not the presidential system of the United States.

10 The Imperial Conference consists of the prime ministers of all the states members of the British Commonwealth. It meets from time to time to discuss matters of common concern. It has no power to direct the policy of any of the governments, but it is the most important organ of Commonwealth co-operation.

#### CHAPTER IX

1 A colony is British territory, and its inhabitants are British subjects. A protectorate is not legally British territory, and its inhabitants are not British subjects, but "protected persons".

2 The most important is the Anglo-Egyptian Sudan.

3 No. Much more often the flag has

reluctantly followed the trader in order to prevent the unregulated exploitation of native territory.

4 The Colonial Development and Welfare Act by authorizing the making of money grants for the development of a dependency and the welfare of its people broke away from the traditional policy under which dependencies though not exploited for the benefit of Britain had been expected to pay their own way out of their own resources.

5 Newfoundland was formerly a fully self-governing dominion but in 1934 it was reduced to the status of a colony at its own request because of financial difficulties in which it had become involved. As one time governed by a Governor and six Commissioners, its population voted for inclusion in the Dominion of Canada.

6 A legislature composed of two chambers.

7 In the former the legislature consists of elected representatives, but it does not control the executive branch of the government. In the latter the executive is responsible to the legislature and depends for its existence on being able to retain its confidence. The Cabinet system of Britain and the Dominions is a system of 'responsible' government.

8 Communal divisions, that is to say, the division of the population into distinct and often conflicting racial or religious communities, as are found in Kenya, mean that the composition of the majority and of the minority is fixed and permanent. Thus a minority community cannot hope ever to control the government, as the opposition party in Britain looks forward to doing in its turn, but remains permanently at the mercy of the majority. If the democratic forms of government are set up in these circumstances, they will not work democratically.

9 A territory for the administration of which the controlling State had to render an account to the League of Nations. It is now to be called a "trust" territory, for which the trustee State will render an account to the United Nations Organization. Mandates and trust territories are not annexed to the controlling State, and

their inhabitants do not take its nationality

#### CHAPTER X

1 The caste system of the Hindu

2 The status into which a man is born determines his social rank and occupation in life. There are four main castes each subdivided into many others. Outside the castes are the Scheduled Castes or "Untouchables," over fifty millions in number.

3 The government of India passed from the East India Company to the British Crown.

4 The word means government by two independent authorities. It was applied to the system introduced into the Indian provinces by the Act of 1919, the principle of which was that some of the subjects of government were placed under the control of Indian ministers responsible to the provincial legislatures, and others were reserved to the Governors.

5 Since 1922 India has adopted a high tariff policy, which has had very damaging effects on British export trade, especially on the cotton trade.

6 Territories which were governed by the Ruling Princes of India and did not form part of British India. Their relations with the "Paramount Power," as Britain was called in this connexion, were regulated by treaties, under which they, for the most part, managed their own internal affairs, their foreign relations being conducted by the British Government. There were 562 States, some very large, others minute in size, covering nearly half the area of India and including about one-fifth that is to say, about eighty millions, of the population.

7 The largest Indian political party, mainly Hindu in membership it was founded in 1884.

8 It demanded "Pakistan", in other words, that those areas of India in which Muslims are in a majority should be cut off from the rest of India and constitute a separate State or States. After long negotiation, these demands were met and two Dominions, India and Pakistan, were created when Britain withdrew her power in 1947.

#### CHAPTER XI

1 The principle is that the central government deals with matters which are of common concern to the citizens of all the States, the State governments with the rest.

2 American courts exercise the function of "judicial review" that is to say they may declare that an act of federal or State legislation is of no legal effect because the legislature in making it has exceeded the powers granted to it by the Constitution. The British doctrine of the 'sovereignty of Parliament' precludes any British court from questioning the validity of an Act of Parliament.

3 In Congress bills are referred to Committees in the first instance and may come before the Chamber as a whole if the Committee approves of them. The Committee, therefore, is concerned not only with the details, as is a Committee of Parliament, but with the principle of a bill and the great majority of bills introduced never emerge from the Committee stage at all.

4 There is no doctrine of collective Cabinet responsibility in the United States and the members of the Cabinet are merely departmental heads each responsible individually and only to the President and removable by him at his pleasure.

5 By the President, but he must have the consent of the Senate which has to be given by a vote of two-thirds of the Senators present. Hence a minority in the Senate can prevent the conclusion of a treaty.

6 In the Senate each State irrespective of size has two members. In the House the basis is population.

7 Because the members of the Electoral College are distributed among the States according to population, and a bare majority of voters in any State will give him the votes of all the members of the College to which that State is entitled.

8 Because although the election of the President by the votes of the whole nation has made the formation of nation wide parties necessary, it has hitherto been impossible in so vast and diversified a country to find nation-wide issues. Accord-

ingly both parties are obliged to be, in effect, alliances of sectional units whose political aims are often divergent.

11. A "primary" is an election, regulated by the law, inside a political party at which the party members elect the party officials and the party candidates for offices. The object is to reduce the influence of the party political "machines."

## CHAPTER XII

1. Switzerland is a federal State. It has a legislature of two chambers, the Council of States consisting of two members elected by each of the twenty-two cantons, and the National Council, to which members are elected by the whole country on a population basis. These two chambers form the Federal Assembly, and this elects the seven members of the Federal Council, or executive organ of the government.

2. A question which any deputy may address to a minister, the object being not to elicit information, but to raise a debate and provoke the passing of a motion on some matter of ministerial policy. It was a common means of upsetting governments, and an important cause of their instability under the Third Republic.

3. The French Committee supervised some particular branch of policy and was a means of securing parliamentary control over the departments of government. In the British Parliament a Committee merely provides a convenient procedure for discussing the details of parliamentary business.

4. Because, when parties are weakly organized or split up into small groups, the continuous support in Parliament and in the country, upon which ministers must necessarily rely for the explanation and defence of their conduct, is lacking.

5. Norway's legislature has one chamber only.

6. They are partly administrative and partly judicial, but in modern times the judicial function is the more important. The Council is the highest court for adjudicating on disputes between private individuals and governmental authorities, and it applies not the ordinary civil law, but a highly specialized branch of

French law called "administrative" law.

7. The French Revolution of 1789; the example of British parliamentary institutions; the early struggles for freedom and independence of the Swiss and the Scandinavian peoples.

8. The British ideal is expressed in "the rule of law"; the French, in "the sovereignty of the people."

9. It has led everywhere to an insistent demand for the application of democratic principles on a broader basis, from the political to the economic and social spheres of life.

## CHAPTER XIII

1. It means simply "A council."

2. Marx and Lenin.

3. A socialist State distributes the wealth produced by the community according to the *value* which it places on the work of each member. Under communism, which is a development of socialism, it is supposed that social classes would have disappeared, members of the community would share its wealth according to their respective *needs*, and, there being no longer any need for coercion and therefore no longer any need for the State, the State would wither away.

4. The Constitution is the instrument through which the Communist Party ensures that effect shall be given to its policies for the State. Should the Communist Party cease to exist the Constitution would be meaningless.

5. Partly because each organ in the subordinate units of government (including the Republics of the Union) is responsible to a corresponding organ in the unit immediately above it, and partly because there is one single Communist party for the whole of the Union.

6. The Supreme Soviet has two houses; the Soviet of the Union, which is based on representation of districts in proportion to population, and the Soviet of Nationalities, the members of which represent the Republics and other subdivisions of the Union which are based on differences of nationality.

7. A body elected by the Supreme Soviet, having wide powers to issue decrees

when the Supreme Soviet is not itself putting, to appoint and dismiss the commissars or ministers, to declare war, ratify treaties, etc

8 He is President of the Council of Ministers, a Marshal of the Soviet Union and Secretary-General of the Communist Party.

9. A Trade Union in the U.S.S.R. is one of the means used by the Communist Party to stimulate production in industry and it also has important responsibilities in the fields of social insurance, factory regulations, and workers' cultural and recreational amenities. But since Soviet theory identifies the interests of the workers with those of the State, that is to say, with the interests of the workers' employer, a Trade Union cannot be an instrument as the western Trade Union is, through which the workers negotiate the conditions under which they are to be employed.

#### CHAPTER XIV

1. On the one hand a heaven-appointed ruler was expected to guide and encourage his people in right living both by his own personal example and by the enunciation of moral precepts, on the other hand he was also bound to punish those whose wickedness disturbed the harmony of society.

2. The government of the Manchu emperors, a foreign dynasty which had ruled China since the middle of the seventeenth century.

3. Dr Sun Yat-sen.

4. A nationalist and radical political party formed in 1912 in which the dominating figures have been Sun Yat-sen, who died in 1925, and since his death Chiang Kai-shek. Since 1928, the Kuomintang has controlled the government of China.

5. The Kuomintang justifies its system of one-party rule by the teaching of Sun Yat-sen that, pending the time when the Chinese people can be trusted to practise democracy in intelligent fashion, it is the duty of the Kuomintang to administer the country for its own good and to educate the people for the new system.

6. A method adopted by the Chinese

emperors and practised for about eight hundred years for recruiting the holders of administrative positions by open competitive examination in the Confucian classics.

7. It helped to break down local loyalties and thus to maintain national unity. It gave the class of scholars a very high prestige among the people. But owing to the rigid exclusion of all but the accepted version of Confucian philosophy it discouraged independence of thought and produced an extreme conservatism in the governing class.

8. The belief that a man's first duty in all circumstances is to honour his parents both in their lives and after their death. The importance thus concentrated on the family encouraged the feeling that there was little need for government to interfere in the social life of the nation.

#### CHAPTER XV

1. The Reformation destroyed the medieval ideal of the unity of Christendom at a time when the need for some unifying bond between states was becoming more necessary than it had ever been. The belief then prevalent in a universal law of nature made it inevitable that that bond should be sought in law.

2. Customs and Treaties.

3. They fulfil the function of the contracts of private law, but they also provide a partial substitute for legislation and thus constitute the most important means of developing the law.

4. International law is still in the *laissez-faire* stage of legal development, imposing a minimum of restraint on the freedom of action of States. Its possibilities as a positive instrument for promoting the common welfare of the general body of States are as yet only recognized to a small extent.

5. The early view was that war was only legal for certain causes, e.g. in self-defence, but as this proved incapable of enforcement it came to be regarded as a sovereign right of States, which they could exercise for any cause or for none. Today we are attempting to return to the original doctrine and to ensure that aggressive war



is regarded as an international crime.

6. Laws of war in the limited sense of the term relate to the conduct of the belligerents towards one another. Laws of neutrality affect the relations between belligerents and those States not involved in the war.

7. An arbitrator is a judge, that is to say, his duty is to decide a case in accordance with law. But he is a judge appointed only to try a particular case, and not a member of a standing court of justice.

8. (i) It is a *permanent* court, and therefore not merely a court of arbitration.

(ii) It is a court for States only, and not for individuals.

(iii) Its jurisdiction is voluntary.

9. A court can only declare the legal

rights of the parties, but many, and almost all the more dangerous, disputes of States do not relate to their legal rights, but to their political interests.

10. To promote international co-operation and to achieve international peace and security. In the former it had a large measure of success. In the latter the disunity of the Great Powers led to its failure.

11. In the League each State had to decide for itself whether the occasion for enforcing the Covenant against an aggressor had arisen or not. In the United Nations the Security Council decides this question for the whole body of members. As a result the Great Powers have insisted that they must have a right to veto decisions of the Security Council, and this threatens to paralyse the whole system.

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